APPENDIX A

IN THE COURT OF APPEALS OF THE
STATE OF NEW MEXICO

No. 24,026; consolidated with
24,027; 24,042; and 24,425

Filing Date: May 7, 2009

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner-Appellee,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT
OF BERNALILLO COUNTY

Susan M. Conway and William F. Lang,
District Judges

OPINION

CASTILLO, *Judge*.

{1} On motion for rehearing, the opinion filed October 30, 2008, is withdrawn, and the following opinion is substituted in its place. The motion for rehearing is otherwise denied.

{2} The operable event that forms the basis for these consolidated cases[1] occurred over thirteen years ago when the Albuquerque City Council (City) adopted the 1995 Uptown Sector Plan (1995 USP), which affected property leased by Albuquerque Commons Partnership (ACP). Until 1995, the leased property was governed by the 1981 Uptown Sector Plan (1981 USP). In 1991, ACP selected Opus Southwest Corporation (Opus) as the buyer for the leasehold. Opus submitted a site plan for the property in June 1994 and then, in July 1994, withdrew the plan because of public outcry. In September 1994, the City requested a comprehensive overview of the 1981 USP. Before the City could complete the overview, Opus submitted another site plan (ACP/Opus site plan). The City deferred consideration of the ACP/Opus site plan and implemented an expedited schedule to evaluate proposed revisions to the 1981 USP. The City ultimately adopted the 1995 USP.

{3} ACP sought review of the City's adoption of the 1995 USP in the trial court. ACP also claimed damages under 42 U.S.C. § 1983 (2000) for violations of due process and for an unconstitutional taking in violation of the Fifth Amendment. Concluding that the 1995 USP was enacted contrary to law as applied to ACP, the trial court ordered the City to consider the ACP/Opus site plan under the 1981 USP. The City complied and ultimately rejected the ACP/Opus site plan under the 1981 USP. The claims for damages continued to trial, and the jury found for ACP on both the due process and the takings claims. The

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[1] The City separately appealed a jury verdict and two whole-record reviews that were conducted by the trial court of the City's decisions regarding ACP's development of the property. On a motion by the City, we consolidated the three appeals.

takings verdict was dismissed pursuant to the doctrine of election of remedies.

{4} ACP appealed to this Court, and we reversed. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque* (*ACP II*), 2006-NMCA-143, ¶ 2, 140 N.M. 751, 149 P.3d 67. Among other things, we held that (1) the City's adoption of the 1995 USP was a legislative act, (2) ACP was not entitled to quasi-judicial process, and (3) the City did not downzone ACP' s property. *Id.* ¶¶ 36-39, 71. ACP appealed, and on certiorari our Supreme Court held that ACP's property was downzoned by the adoption of the 1995 USP and that as a result, the City had been required to provide ACP with quasi-judicial process. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque* (*ACP III*), 2008-NMSC-025, ¶¶ 33, 43, 144 N.M. 99, 184 P.3d 411. The Supreme Court went on to hold that because the City did not provide these enhanced procedures, ACP's right to due process had been violated and that the 1995 USP was not properly enacted. *Id.* ¶¶ 51-52. Finally, the Supreme Court concluded that the City had wrongfully denied ACP approval of the ACP/Opus site plan under the 1981 USP. *Id.* ¶¶ 58-59. The Supreme Court therefore reversed *ACP II* and remanded the case to this Court to make the following determinations: (1) whether ACP had a constitutionally protected property interest that would satisfy the threshold requirement for a Section 1983 claim, (2) whether the 1995 USP was an unconstitutional taking of ACP's property by the City, and (3) whether damages were properly awarded. *Id.* ¶¶ 53-60. We will also consider the City's challenges to the trial court's award of

attorney fees and costs.[2] We address each issue in turn and hold as follows: (1) we affirm the jury award of damages in the amount of $8,349,095 to ACP on its Section 1983 claim; (2) we need not address the issues related to the takings verdict because we affirm the Section 1983 award; (3) we reverse the award of post-judgment interest; and (4) we affirm the trial court's award of attorney fees and costs.

{5} The facts surrounding the adoption of the 1995 USP, the resulting law suits, and the several appeals are set forth in *ACP II*, 2006-NMCA-143, ¶¶ 4-29, 140 N.M. 751 149 P.3d 67, and in *ACP III*, 2008-NMSC-025, ¶¶ 4-20 144 N.M. 99, 184 P.3d 411. We need not repeat the long and complicated history of the case. Instead, we rely on the short background summary that we have already recited and will include additional facts as necessary. We now turn to the remaining issues on appeal.

DISCUSSION

A. Section 1983 Claim

{6} In order to prove its claim under Section 1983, ACP was required to show that the City, "acting under color of state law, cause[d ACP] to be deprived of a federally protected constitutional right." *Miles v. Bd. of County Comm'rs*, 1998-NMCA-118, ¶ 6, 125

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[2] The City's appeal as to attorney fees and costs was a separate appeal before this Court. Before the Supreme Court filed ACP III, we reversed the trial court's allocation of costs and fees in a memorandum opinion. *Albuquerque Commons P'ship v. City Council of the City of Albuquerque*, No. 24,425, slip op. at 3 (N.M.Ct.App. Dec.9, 2005). As a result of the holding in *ACP III*, we now consolidate the fees and costs appeal with the other three consolidated cases considered by the Supreme Court in *ACP III*.

N.M. 608, 964 P.2d 169. ACP argued at trial that the protected constitutional right violated by the City was the right to procedural due process. The jury entered a verdict for ACP. In its appeal to this Court, the City challenges the due process verdict on the following grounds: (1) the trial court improperly found that ACP had a constitutionally protected property right; (2) procedural due process protections do not apply in the present case because the adoption of the 1995 USP was a legislative act, and ACP received all of the process that was due; (3) the Section 1983 claim was not ripe; and (4) the trial court improperly awarded damages. In addressing each argument, we look to the holdings of our Supreme Court in *ACP III*—that ACP's property was downzoned, that the City accomplished the downzoning in a manner that violated ACP's due process rights, and that the adoption of the 1995 USP required a quasi-judicial hearing. ACP III, 2008-NMSC-025, ¶¶43, 51, 144 N.M. 99, 184 P.3d 411. We begin with the nature of ACP's property right.

1. *Property Right*

{7} To establish a violation of procedural due process, ACP was required to show that the City deprived ACP of "life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. Here, we focus on the property interest portion of the equation. In order to decide whether a party has a constitutionally protected property right, we first must determine whether there is a state-created substantive property right and then consider whether that right triggers federal due process protections. *Memphis Light, Gas & Water Div. v. Craft* (*Memphis Light*), 436 U.S. 1, 10, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) ("Although the underlying substantive interest

is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause." (internal quotation marks and citation omitted)).

a. State-Created Property Right

{8} Our Supreme Court has explained that constitutionally protected "property interests are those to which an individual has a claim of entitlement." *Mills v. N.M. State Bd. of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 15, 123 N.M. 421, 941 P.2d 502. Although it is well settled under New Mexico law that a property owner has no vested right in a particular zoning classification, *Aragon & McCoy v. Albuquerque Nat'l Bank*, 99 N.M. 420, 423, 659 P.2d 306, 309 (1983), ACP relies on requirements associated with "downzoning" in order to establish a property right. According to ACP, because its property was downzoned, and not simply re-zoned, the City was required to establish a mistake in the original zoning or subsequent changed conditions in the neighborhood before the zoning could be legally changed. *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976). The requirement enunciated in *Miller* is referred to as the "change or mistake" rule. Our Supreme Court agreed with ACP's position and held that "the City's actions did constitute a downzoning of [ACP's] property without complying with important standards set forth in *Miller and Davis* [*v. City of Albuquerque*, 98 N.M. 319, 321, 648 P.2d 777, 779 (1982)]." *ACP III*, 2008-NMSC-025, ¶ 2, 144 N.M. 99, 184 P.3d 411.

{9} In addition, the City's applicable zoning regulation—Resolution 270-1980—tracks the "change or mistake" requirement. *ACP III*, 2008-NMSC-025, 28,

144 N.M. 99, 184 P.3d 411. In order to implement a map amendment to a zoning classification, Resolution 270-1980 requires the City to "demonstrate that the existing zoning is inappropriate because (1) there was an error when the existing zone map pattern was created, or (2) changed neighborhood or community conditions justify the change, or (3) a different use category is more advantageous to the community." *ACP II*, 2006-NMCA-143, 64, 140 N.M. 751, 149 P.3d 67 (internal quotation marks and citation omitted). In the present case, the Supreme Court has held that the 1995 USP was a map amendment, which triggered the requirements of Resolution 270-1980. *ACP III*, 2008-NMSC-025, ¶ 50, 144 N.M. 99, 184 P.3d 411.

{10} Based on these New Mexico cases and Resolution 270-1980, we agree with the trial court that ACP had a right, under state law, to continued zoning in the face of downzoning or a map amendment unless the City was able to justify a zoning change under the requirements enunciated by Resolution 270-1980 and *Miller*. Accordingly, we conclude that ACP had a state-created property interest.

b. Federal Protection

{11} The next inquiry is whether the federal constitution extends its protection to this state-created property right. A party claiming a federally protected property interest must have a "legitimate claim of entitlement to it." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). "[A] legitimate claim of entitlement is created only when the statutes or regulations in question establish a framework of factual conditions delimiting entitlements which are capable of being explored at a due process hearing." *Eidson v. Pierce*, 745 F.2d 453, 459-60 (7th Cir. 1984). In the context of

municipal land use regulation, "[t]he entitlement analysis centers on the degree of discretion given the decisionmaker and not on the probability of the decision's favorable outcome." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000) (internal quotation marks and citation omitted). Accordingly, we must decide whether the applicable law, Resolution 270-1980 or *Miller*, substantively limited the City's discretion to pass the 1995 USP. *See Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence* (*Jacobs*), 927 F.2d 1111, 1116 (10th Cir. 1991). "Otherwise, the city's decisionmaking lacks sufficient substantive limitations to invoke due process guarantees." *Id.*

{12} As we have explained, Resolution 270-1980 requires the City to justify zone map amendments by establishing (1) errors at the time the existing zone map pattern was created, or (2) changes in the neighborhood or community conditions that justify the amendment, or (3) that a different use category is more advantageous tc the community. These are substantive and direct limitations on the City's discretion: By its own rules, the City cannot make a zone map amendment without demonstrating, in some fashion, at least one of these criteria. *See ACP III*, 2008-NMSC-025, ¶ 28, 144 N.M. 99, 184 P.3d 411 (stating that Resolution 270-1980 requires the proponent of a piecemeal downzoning to establish one of three criteria).

{13} In addition, *Miller* unequivocally limits the City's ability to downzone a particular piece of property. 89 N.M. at 506, 554 P.2d at 668. "[B]efore a piecemeal zoning change is sought, the above principles and considerations *must be taken into account*, particularly when the zoning change of a piece of prop-

erty is sought by the zoning authority instead of by the owner of the property affected." *Id.* (emphasis added) (internal quotation marks and citation omitted). The *ACP III* Court concluded that passage of the 1995 USP created a zone map amendment, 2008-NMSC-025, ¶ 50, 144 N.M. 99, 184 P.3d 411, and that it had the effect of downzoning ACP's property. *Id.* ¶ 43. The requirements of both Resolution 270-1980 and the requirements under *Miller* were therefore triggered; however, *ACP III* again provides guidance. Because rigid application of the *Miller* rule would "unduly impede the zoning authority's ability to make zoning decisions that are ultimately beneficial to the community at large," our Supreme Court concluded that the requirements of "Resolution 270-1980 adequately accommodate[] the need for planning and zoning flexibility." *ACP III*, 2008-NMSC-025, ¶ 30, 144 N.M. 99, 184 P.3d 411. As a result, it was necessary for the City to establish one of the three criteria set forth in Resolution 270-1980, including that "the change is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan." *Id.* (internal quotation marks and citation omitted).

{14} Our Supreme Court explained in *ACP III* that the zoning changes effected by the City in the present case "must be justified pursuant to the *Miller* rule and Resolution 270-1980" and that such changes "require specific factual findings relating to the affected properties." *ACP III*, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 184 P.3d 411. The parties are entitled to individual notice, to "an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and

adequate findings executed." *Id.* ¶ 34 (internal quotation marks and citation omitted). All of these procedural requirements are necessary in order for the City to properly establish the substantive criteria: change, mistake, or a more advantageous use category. *See id.* ¶ 30 (establishing the minimum "proof required to demonstrate a more advantageous use category). When attempting to accomplish the type of downzoning at issue in this case, the City has no discretion to proceed without providing evidence to justify the change in accordance with these criteria. *See id.* ¶ 51 ("The [95 USP] Intense Core restrictions singled out a small section of the Uptown Sector and downzoned that area, requiring the City, as the proponent of the zone change, to justify that change in accordance with the criteria set forth in *Miller* and Resolution 270-1980.").

{15} The focus in this inquiry is not the City's failure or success in establishing change, mistake, or a more advantageous use. Rather, the property right is created in the language of the Resolution, *Miller*, *Davis*, and most recently, *ACP III*, all of which eliminate the City's discretion to engage in spot downzoning without considering the factors. *See ACP III*, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 184 P.3d 411 ("[B]ecause such [spot downzoning] must be justified pursuant to the *Miller* rule and Resolution 270-1980 (or a similar local policy), they require specific factual findings relating to the affected properties."). To reiterate, any failure by the City to actually establish one of the criteria does not lead to a property deprivation or a due process violation redressable under Section 1983. Such a deprivation or violation only arises in the event that a party is denied notice or a meaningful opportunity to be heard.

{16} The City argues that it has enormous discretion in its application of the Resolution 270-1980 factors—particularly in the application of the "more advantageous use" criterion—and that because the factors do not dictate the outcome of the City's spot downzoning decision, Resolution 270-1980 and *Miller* do not create a protected property right. We first observe that our Supreme Court has substantially narrowed the City's discretion in the application of this factor. In *ACP III*, the Court explained that the "proof' of a more advantageous use category "would have to show, at a minimum, that '(1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property.'" 2008-NMSC-025, ¶ 30, 144 N.M. 99, 184 P.3d 411 (quoting *Fasano v. Bd. of County Comm'rs of Wash. County*, 264 Or. 574, 507 P.2d 23, 28 (1973), *superceded by statute as stated in Menges v. Bd. of County Commis of Jackson County*, 44 Or.App. 603, 606 P.2d 681 (1980)).

{17} Second, we are not persuaded that the cases cited by the City require us to conclude that in order for ACP to have a federally protected property interest to be free from spot downzoning absent a *Miller*/*Davis*/Resolution 270-1980 inquiry, the outcome of the City's spot-zoning determination must be predetermined by the governing law. The City cites *Kentucky Department of Corrections v. Thompson* (*Thompson*), 490 U.S. 454, 109 S.Ct. 1904, 104 L.Ed.2d 506 (1989), *Hyde Park Co., Jacobs, and Sylvia Development Corp. v. Calvert County*, 48 F.3d 810 (4th Cir. 1995).

{18} In *Thompson*, the Supreme Court of the United States concluded that prison regulations did not place sufficient substantive limitations on the state's discretion to allow a prisoner to receive visitors. 490 U.S. at 464-65, 109 S.Ct. 1904. As a result, the prisoner did not have a protected liberty interest in the regulations that allowed for visitors. *Id.* at 465, 109 S.Ct. 1904. The Court explained that "the most common manner in which a [s]tate creates a liberty interest is by establishing substantive predicates to govern official decision-making, and, further, by mandating the outcome to be reached upon a finding that the relevant criteria have been met." *Id.* at 462, 109 S.Ct. 1904 (internal quotation marks and citation omitted). Ultimately, the Court reasoned that "[t]he overall effect of the regulations is not such that an inmate can reasonably form an objective expectation that a visit would necessarily be allowed absent the occurrence of one of the listed conditions." *Id.* at 464-65, 109 S.Ct. 1904. The Court continued: "Or, to state it differently, the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against the prison officials." *Id.* at 465, 109 S.Ct. 1904.

{19} The City's reliance on *Thompson* is misplaced. First, the case concerns the constitutional rights of a prisoner, which have been construed narrowly over the past thirty years. *See* Ahmed A. White, *The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society*, 56 Buff. L. Rev. 737, 777 (2008) ("[T]he courts made clear that, while they are not entirely beyond the realm of constitutional protection, prisoners only enjoy such constitutional rights as are consistent with legitimate penological interests; and that in determining what those interests are, courts must generally defer to the discretion

of prison officials, granting them wide deference in fashioning and implementing penological policies." (internal quotation marks and footnotes omitted)). Second, the property right in the present case is the right to continued zoning in the face of spot down-zoning, absent a showing of evidence under *Miller/Davis*/Resolution 270-1980. Considering the mandatory language in *Miller* and Resolution 270-1980, ACP could "reasonably form an objective expectation" that its zoning category would remain in effect absent evidence that could establish at least one of the required criteria. *See Thompson*, 490 U.S. at 465, 109 S.Ct. 1904.

{20} In *Hyde Park Co.*, the Tenth Circuit Court of Appeals was faced with a different factual scenario. In that case, a developer applied to the City of Santa Fe for approval of a proposed subdivision plat. 226 F.3d at 1209. The proposal was denied and the developer appealed, arguing that it had a constitutionally protected property right in approval of its plat. *Id.* The *Hyde Park Co.*, Court disagreed because "the applicable ordinances read as a whole fail to place any discernible substantive limitations on the [city's] discretion in this matter." *Id.* at 1212. According to the ordinance in *Hyde Park Co.*, the city "had the power to affirm, reverse, or modify the . . . decision as ought to be made." *Id.* "Without clearly defined limitations on the [city's] exercise of discretion to assist [in the] construction of local law," the Tenth Circuit hesitated "to infer such limits and involve [a] federal court in a land use regulation dispute which is purely a matter of local concern." *Id.* In order to have demonstrated the requisite limitation on the city's discretion, the plaintiffs in *Hyde Park Co.* would have had to show that "a set of conditions exist under state and local law, the fulfillment of which would give rise

to a legitimate expectation" of plat approval—the asserted federally protected right. *Id.* at 1210 (internal quotation marks and citation omitted).

{21} In the present case, ACP had to show a set of conditions existing under local law which, if fulfilled, would give rise to a legitimate expectation that the City would provide evidence regarding the zoning change according to *Miller* and Resolution 270-1980. Unlike the ordinance in *Hyde Park Co.*, Resolution 270-1980 provides "clearly defined limitations" on the City's discretion to engage in spot downzoning, and there is no need to infer substantive limitations—those limitations are delineated in the ordinance. *See* 226 F.3d at 1212.

{22} In *Jacobs*, the Tenth Circuit Court of Appeals also considered whether a zoning body's discretion was sufficiently limited such that the parties had a "legitimate expectation to the rezoning of their property." 927 F.2d at 1116. The landowners in that case argued that certain factors set out in a state court opinion were sufficient to limit the discretion of the city commissioners. *Id.* at 1114, 1116. The *Jacobs* Court disagreed because the state supreme court had acknowledged that the factors were not meant to be limits but, instead, "meant only as suggestions." *Id.* at 1116. Therefore, the state law did not "arm [the] appellants with sufficient rules or mutually explicit understandings that support [their] claim of entitlement." *Id.* at 1117 (second alteration in original) (internal quotation marks and citation omitted). The limitations set forth in *Miller* and in Resolution 270-1980 are not merely suggestions. The *Miller* Court expressed in no uncertain terms that prior to piecemeal downzoning, the stated "principles and considerations must be taken into account." 89 N.M. at 506,

554 P.2d at 668. Resolution 270-1980 states that the applicants "must demonstrate" at least one of the three requirements enumerated in the resolution. The language of *Miller* and Resolution 270-1980 is sufficiently mandatory to support a claim of entitlement.

{23} *Sylvia Development Corp.* is similar to *Hyde Park Co.* and *Jacobs*: a developer applied to the county board of commissioners for a special zoning designation, which was denied after vociferous public outcry. *Sylvia Dev. Corp.*, 48 F.3d at 815, 816. The developer appealed and argued, in relevant part, that it was entitled to approval of its application if all of the criteria set forth in the applicable zoning ordinance were met. *Id.* at 825-26. The Fourth Circuit Court disagreed for two reasons: (1) till county had complete discretion to create the requested special zoning designation because of permissive language in the ordinance and (2) the criteria in the zoning ordinance were merely preconditions to be met by an applicant before the county would consider creating a special zoning designation. *Id.* at 826. As we have explained, Resolution 270-1980 is neither permissive in its language nor does it outline preconditions that a property owner is required to meet. Instead, in the event of a spot downzoning, Resolution 270-1980 and *Miller* require the City to provide proof of the listed criteria. *See ACP III*, 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411 ("The burden is on the proponent of the zone change to establish that the change is justified.").

{24} We note a further distinction between the present case and *Hyde Park Co.*, *Jacobs*, and *Sylvia Development Corp.* In these three federal cases, the plaintiffs sought to obtain an as yet non-existent

benefit: approval of a plat, *Hyde Park Co.*, 226 F.3d at 1209, a zoning change, *Jacobs*, 927 F.2d at 1113, or a special zoning designation. *Sylvia Dev. Corp.*, 48 F.3d at 815. In the present case, ACP seeks to maintain an already existing benefit—a zoning classification—in the face of the City's attempt to downzone the property. *See ACP III*, 2008-NMSC-025, ¶ 43, 144 N.M. 99, 184 P.3d 411. "[P]rocedural protection of property has been recognized as a valid safeguard of 'interests that a person has already acquired in specific benefits' and as a means 'to protect those claims upon which people rely in their daily lives.'" *Jacobs*, 927 F.2d at 1118 (quoting *Roth*, 408 U.S. at 577, 92 S.Ct. 2701). The City is required to justify piecemeal zone map amendments according to Resolution 270-1980 and piecemeal downzoning under *Miller*. That justification is a benefit that ACP acquired prior to the proposal and adoption of the 1995 USP. *See River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166 (7th Cir. 1994) ("Those things people can hold or do without the government's aid count as property or liberty no matter what criteria the law provides.").

{25} We consider the present case to bear a certain resemblance to *Memphis Light*. In that case, the United States Supreme Court considered whether homeowners had a constitutionally protected property interest in continued utility service. 436 U.S. at 3, 98 S.Ct 1554. The *Memphis Light* Court concluded that "t]he outcome of that inquiry is clear in this case," *id.* at 9, 98 S.Ct 1554, because the law of the state did "not permit a public utility to terminate service 'at will.' *Id.* at 11, 98 S.Ct 1554. Instead, in that state, a public utility could "terminate service only for cause." *Id.* As a result, the homeowner had a continued right to utility service until the public

utility could establish cause to terminate service. *See id.* In the present case, the City could only adopt the 1995 USP if it could establish at least one of the requirements of Resolution 270-1980—just as the utility could only terminate service for cause. Neither ACP nor the homeowner had "rights of undisputed ownership." *Memphis Light*, 436 U.S. at 11, 98 S.Ct 1554 (internal quotation marks and citation omitted). Nevertheless, both parties asserted a "legitimate claim of entitlement within the protection of the Due Process Clause." *Id.* at 12, 98 S.Ct 1554 (internal quotation marks and citation omitted).

{26} Although ACP's pre-existing benefit, or entitlement, is limited and is triggered only under the conditions explained in *Miller* or outlined in Resolution 270-1980, we conclude that ACP has a federally protected property interest to continued zoning under the narrow circumstances presented by this case. Accordingly, we turn next to consider whether ACP received all of the process that it was due in order to protect its property right.

2. Process Due

{27} We next consider whether the process provided by the City was sufficient to safeguard ACP's constitutionally protected property right. The City argues that ACP received all of the process that was due because the City provided and ACP participated in seven hearings about the adoption of the 1995 USP. Further, the City argues that because the adoption of the 1995 USP was a legislative act, constitutional due process was not required. We first note that our Supreme Court held in *ACP III* that the adoption of the 1995 USP was a quasi-judicial, and not a legislative, act. *ACP III*, 2008-NMSC-025, ¶¶ 37-39, 43, 144 N.M. 99, 184 P.3d 411.

{28} We also observe that our Supreme Court in *ACP III* outlined the quasi-judicial hearing process to which piecemeal or spot downzoned property owners are entitled. 2008-NMSC-025, ¶ 34, 144 N.M. 99, 184 P.3d 411. While this process is certainly necessary to satisfy state law, Section 1983 actions are brought under federal law. The United States Supreme Court has explained that "[p]rocess is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim v. Wakinekona*, 461 U.S. 238, 250, 103 S.Ct. 1741, 75 L.Ed.2d 813 (1983). The *Olim* Court concluded that while a state may choose to require certain procedures, "making that choice . . . does not create an independent substantive right." *Id.* at 250-51, 103 S.Ct. 1741. In particular, the characterization of a zoning process as quasi-judicial does not engender the "expectation of a property interest or otherwise place substantive limitations on official discretion." *Jacobs*, 927 F.2d at 1117. From these authorities, we conclude that the failure to hold a particular type of hearing was not by itself a failure of due process actionable under Section 1983.

{29} "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) (internal quotation marks and citation omitted), *abrogated on other grounds as recognized by State v. Gonzales*, 2001-NMCA-025, ¶ 58 & n.1, 130 N.M. 341, 24 P.3d 776. "[R]esolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected." *Mathews*, 424 U.S. at 334, 96 S.Ct. 893; *see also Erica, Inc. v. N.M. Regulation & Licensing Dep't*,

Alcohol & Gaming Div., 2008-NMCA-065, 27, 144 N.M. 132, 184 P.3d 444. That analysis includes three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335, 96 S.Ct. 893. We have already identified ACP's private interest: the right to continued zoning unless the City can justify downzoning according to the requirements of Resolution 270-1980.

{30} The second factor considers (1) the risk of erroneous deprivation absent the requested procedure and (2) the probative value of the additional safeguard. To analyze the second factor, we must first consider what procedure ACP requested. The City points out that ACP had an opportunity to participate in seven hearings and that seven hearings satisfied any procedural due process right. ACP disagrees.

{31} In order to resolve this issue, we need only turn to one aspect of the hearing—the type of tribunal. During its review of the downzoning issue, our Supreme Court concluded that the City made "no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts on the part of the council members." 2008-NMSC-025, ¶ 36, 144 N.M. 99, 184 P.3d 411. The question remains, however, whether an impartial tribunal would substantially reduce the

risk of erroneous deprivation of ACP's protected right and what the probable value of an impartial tribunal would be.

{32} It is well established that "a fair trial in a fair tribunal is a basic requirement of due process." *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456 43 L.Ed.2d 712 (1975) (internal quotation marks and citation omitted). Our Supreme Court has determined that the City Council was a biased tribunal. *ACP III*, 2008-NMSC-025, ¶ 36, 144 N.M. 99, 184 P.3d 411. Hearings before a biased tribunal create a substantial risk of erroneous deprivation. *See NM Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248, 164 P.3d 947 ("Pro-cedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." (internal quotation marks and citation omitted)). The present case exemplifies the risk. The City perceived itself to be conducting a legislative hearing. While a quasi-judicial hearing is not required to satisfy due process, a legislative hearing before a legislative tribunal led to actual ex parte contact in this case. *See Withrow*, 421 U.S. at 47, 95 S.Ct. 1456 (explaining that a contention of bias "must overcome a presumption of honesty and integrity of those serving as adjudicators"). Prior to the adoption of the 1995 USP, a non-counselor contacted a counselor—outside of the hearings—and "encouraged" her not to propose amendments to the 1995 USP that would have allowed ACP to proceed with its project. *ACP III*, 2008-NMSC-025, ¶ 36 n. 3, 144 N.M. 99, 184 P.3d 411. The counselor acted on the contact, withdrawing her proposed amendments. *Id.* Thus, this ex parte contact had a direct, negative effect on ACP's protected property right, and an impartial tribunal

would have had a great deal of value as an additional safeguard.

{33} Analysis of the third factor shows that there is no added burden on the City to provide a meaningful opportunity to be heard before an impartial tribunal. Taking all of the factors together, we conclude that the balance weighs in favor of providing a property owner with an impartial tribunal—one free from ex parte contacts—prior to implementing a piecemeal downzone.

3. Adequacy of State Remedies

{34} Despite our holding that the City's procedure failed to provide ACP with adequate process to protect its property rights, we continue our analysis to determine whether ACP properly established a Section 1983 cause of action in light of available state-law remedies. *See Starko, Inc. v. Gallegos*, 2006-NMCA-085, ¶19, 140 N.M. 136, 140 P.3d 1085 (explaining that "not all deprivations of property interests, even if they are in violation of state law, are actionable under [Section] 1983" because plaintiffs must show that "state remedies provided inadequate procedural safeguards"). The City makes two arguments in this regard: (1) a due process deprivation is not complete until the process has failed and whether the process has failed cannot be determined until the deprived party has navigated the entire system of available state appeals and (2) any procedural error that may have occurred in the present case was simply a mistake and "is not tantamount to a violation of a federal right." We address each argument in turn.

{35} The City's first argument is based on the multiple levels of state court review that were avail-

able to ACP after the 95 USP passed. The City contends that at the first level of review in the district court, ACP argued against remand for the City to conduct a quasi-judicial review of the ACP/Opus site plan. Thus, the City argues, any due process violation was never complete because review of the passage of the 95 USP was available in the district court, this Court, and our Supreme Court, and ACP refused to participate in that procedure. ACP maintains that no state remedy was available to adequately address its loss. With this argument, ACP appears to focus on its financial loss rather than on any due process violation. It is well established that "[a]lthough the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under [Section] 1983, that does not mean that the state remedies were not adequate to satisfy the requirements of due process." *Parratt v. Taylor*, 451 U.S. 527, 544, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). Having disposed of ACP's challenge to the adequacy of the available state remedies to address the financial loss, we turn to consider whether the state appellate process was adequate to address the due process violation in the present case.

{36} The Supreme Court of the United States has explained that in some cases, "due process requires a predeprivation hearing before the [s]tate interferes with any liberty or property interest enjoyed by its citizens," *id.* at 537, 101 S.Ct. 1908, and, as a result, state appellate procedures are not sufficient to cure a due process violation. In such cases, "deprivations of property [are] authorized by an established state procedure and due process [requires] predeprivation

notice and [a] hearing in order to serve as a check on the possibility that a wrongful deprivation [c]ould occur." *Id.* at 538, 101 S.Ct. 1908. In other cases, for example in *Parratt* itself, "random and unauthorized" state acts that lead to deprivations of property are cured by a postdeprivation hearing—or an appeal—because a predeprivation hearing is impractical. *Id.* at 541, 543, 101 S.Ct. 1908. We thus consider whether the City's actions were random and unauthorized in order to determine whether the available appellate process was a constitutionally sufficient remedy for ACP's due process deprivation.

{37} The City cites *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994), which held that a biased decisionmaker is an inherently random and unauthorized act because bias is not sanctioned by the state. *Id.* at 1563. As a result, the *McKinney* court concluded that the plaintiff was not deprived of due process unless the state refused to address the alleged bias on appeal from the administrative proceeding. *See id.* at 1562. We are unpersuaded by *McKinney* for two reasons.

{38} First, *McKinney* was decided in the context of employment termination proceedings and the long line of cases that establish a fired employee's due process rights. *Id.* ("[I]n the case of an employment termination case, due process [does not] require the state to provide an impartial decisionmaker at the pre-termination hearing. The state is obligated only to make available the means by which [the employee] can receive redress for the deprivations." (internal quotation marks and citation omitted)). Second, although the logic of *McKinney* is superficially attractive—that a biased tribunal is inherently not authorized by the state—the facts of the present case do

not bear out this presumption. The City's improper process was neither unpredictable nor the result of the rogue actions of one city councilor. The City chose to proceed by legislative hearings—a procedure that did not provide an impartial tribunal and allowed for ex parte contact. In addition, we are faced with the rare circumstance of having allegations of bias borne out by the record: a city councilor had indicated one course of action, was contacted by a constituent with an opposing view, and after that contact, the councilor changed her position and her vote. *See ACP III*, 2008-NMSC-025, ¶ 36 n.3, 144 N.M. 99, 184 P.3d 411. The decision to proceed legislatively is not sufficient alone to create a due process violation; it is possible that a legislative hearing could provide a meaningful opportunity to be heard or could be conducted without evidence of ex parte contact resulting in improper influence. Under the facts of the present case, however, as recognized by our Supreme Court in *ACP III*, there is substantial evidence to support the jury's decision that ACP did not receive an impartial tribunal and that the flawed process was selected and endorsed as an official act of the whole governmental power of the City. *See id.* As a result, we are unpersuaded by the presumption applied in *McKinney*.

{39} The present circumstances are more closely aligned with *Zinermon v. Burch*, 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). The plaintiff in *Zinermon* was admitted as a voluntary mental patient even though he was incompetent to provide informed consent for his admission. *Id.* at 114-15, 110 S.Ct. 975. The defendants argued that a postdeprivation remedy was sufficient, in lieu of a Section 1983 action, because the constitutional deprivation was the result of a random and unauthorized action

by a state employee. *Id.* at 115, 110 S.Ct. 975. The Supreme Court of the United States explained that generally, "the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property." *Id.* at 127, 110 S.Ct. 975. The random and unauthorized rule articulated in *Parratt* represents "a special case . . . in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the [s]tate could be expected to provide." *Zinermon*, 494 U.S. at 128, 110 S.Ct. 975. In *Zinermon*, the state statute delegated broad authority to hospitals to admit patients, effectively without informed consent. *Id.* at 135, 110 S.Ct. 975. As a result, the hospital staff had "state authority to deprive pensons of liberty [and] the Constitution imposed on them the [s]tate's concomitant duty to see that no deprivation occur without adequate procedural protections." *Id.* The *Zinermon* Court concluded that the postdeprivation procedures were inadequate because the deprivation was not unpredictable, predeprivation procedures were not impossible, and the deprivation was not unauthorized. *Id.* at 136-38, 110 S.Ct. 975.

{40} In the present case, the City—as it strenuously argues—has broad authority to make zoning decisions that can lead to deprivations of constitutionally protected property rights. Part and parcel with that authority is the duty to provide adequate predeprivation procedural protections. Similar to the deprivation in *Zinernon*, an impermissibly biased tribunal was not unpredictable: the City's decision to proceed legislatively carried with it the risk of ex parte contact and bias and, based on the record, the risk was elevated to reality. In addition, it was not impossible for the City to provide an unbiased tribunal. In *Parratt*, the deprivation involved the loss of personal

property by prison officials—an action which was impossible for the state to predict and prevent by predeprivation hearing. 451 U.S. at 541, 101 S.Ct. 1908. In the present case, the City was contemplating spot downzoning of ACP's property, had a working knowledge of the common procedures involved in legislative hearings, and could have anticipated that councilors would be contacted outside of the official proceedings. It cannot be said that the instance of actual bias that resulted from the procedures employed was unpredictable. Finally, we have already addressed the argument that the biased tribunal was unauthorized and need not repeat our analysis here.

{41} We now reach the City's second argument, which concerns the decision to proceed legislatively. The City maintains that its decision to proceed legislatively was merely a procedural error that does not rise to the level of a constitutional violation and that if ACP is permitted to recover under Section 1983 based on a procedural flaw in the proceedings, property owners will have "the unilateral option to cash in on any procedural flaw in an administrative proceeding by declining remand and pursuing a [Section] 1983 action." We disagree.

{42} The bias in the present case was more than a procedural flaw because ACP had a protected property interest, it was entitled to due process, and there is evidence of actual bias in the process afforded by the City. An unbiased tribunal was a constitutional requirement in the present case. *See* 1 E.C. Yokley, *Zoning Law and Practice* § 3A-1[d], at 3A-23 (4th ed. 2008) ("Procedural due process, however, will apply where a decision is administrative or quasi-judicial *and* the property owner has an entitlement rather than an expectancy to whatever

he or she sought." (footnotes omitted)). In addition, the decision to proceed under Section 1983, rather than to pursue administrative remedies, is a tactical and risk-laden choice. *See* 2 Steven H. Steinglass, *Section 1983 Litigation in State Courts* § 17:3, at 17-7 to 17-8 (2008) (discussing the tactical reasons for resorting to a Section 1983 action or for voluntarily submitting claims to administrative proceedings). The litigant takes the risk of receiving no remedy at all should he neglect to pursue administrative remedies, and the Section 1983 action may be blocked by the myriad of requirements that stand between a plaintiff and relief.

{43} We recognize that other courts have concluded that minimal process is due under the Constitution in zoning cases and that a municipality's failure to provide the process required under local law is a matter for state courts, not Section 1983. *See River Park, Inc.*, 23 F.3d at 166-67. The *River Park, Inc.* court succinctly explained that "the due process clause permits municipalities to use political methods to decide, so that the only procedural rules at stake are those local law provides, and these rules must be vindicated in local courts." *Id.* at 167. Nevertheless, our analysis of the present case leads to the conclusion that ACP had a property right that was to be afforded federal due process protections. Due process requires notice of the pending deprivation and a meaningful opportunity to be heard. In the present case, the meaningful opportunity to be heard was foreclosed by evidence of actual and impermissible bias on the tribunal—bias that was the foreseeable result of the political process chosen by the City as its official act to effectuate the deprivation of ACP's property. Under the unusual circumstances of this case, we therefore hold that ACP's Section 1983

action was not foreclosed by available state remedies and that the City's failure to provide ACP with an impartial tribunal violated ACP's right to procedural due process. *See ACP III*, 2008-NMSC-025, ¶ 52, 144 N.M. 99, 184 P.3d 411 ("[T]he City's decision lacked procedural fairness and did not comport with due process of law.").

4. Ripeness of the Section 1983 Claim

{44} The City contends that because ACP prevailed on both the due process and the takings issues at trial, ACP cannot recover damages for the Section 1983 claim until it has attempted to recover compensation for the taking. As a result of ACP's failure to seek recovery for the taking, the City argues that the due process claim is not ripe. For support, the City cites *Rocky Mountain Materials & Asphalt, Inc. v. Board of County Commissioners* (*Rocky Mountain*), 972 F.2d 309 (10th Cir. 1992). In that case, the Tenth Circuit provided the following explanation:

> When a plaintiff alleges that he was denied a property interest without due process, and the loss of that property interest is the same loss upon which the plaintiff's takings claim is based, we have required the plaintiff to utilize the remedies applicable to the takings claim. It is appropriate in this case to subsume the more generalized Fourteenth Amendment due process protections within the more particularized protections of the Just Compensation Clause. Accordingly, until a plaintiff has resorted to the condemnation procedures to recover compensation for the alleged taking, the procedural due process claim is likewise not ripe because it is in essence based on the same deprivation.

Id. at 311 (internal quotation marks and citation omitted). ACP argues that (1) federal ripeness jurisprudence does not apply, (2) the takings claim was not coextensive with the due process claim, and (3) no state remedy existed for the takings claim, and ACP was therefore not required to pursue a non-existent remedy. For the reasons listed below, we agree with ACP that the takings claim and the due process claim were not coextensive, and we therefore do not address ACP's other points.

{45} *Rocky Mountain* identified two sets of circumstances. In one scenario, the loss of the property interest is the same loss upon which the takings claims is premised. *Id.* This is the scenario which the City argues is similar to the present case. However *Rocky Mountain* goes on to explain that "[t]here are many intangible [property] rights that merit the protection of procedural due process although their infringement fall short of an exercise of the power of eminent domain for which just compensation required under the Fifth and Fourteenth Amendments." *Id.* (alterations in original), (internal quotation marks and citation omitted).

{46} In the present case, the property right that forms the basis for the due process claim is an intangible right—the right to continuation of a certain zoning classification until the City can establish specific circumstances, as we have identified in preceding paragraphs. ACP's loss resulting from the due process violation was loss of opportunity to meaningfully participate in a hearing related to the adoption of the 1995 USP. Our Supreme Court has determined that ACP's deprivation of this meaningful hearing resulted in its inability to develop its property. *See ACP III*, 2008-NMSC-025, ¶ 59, 144 N.M.

99, 184 P.3d 411. The jury was instructed accordingly on damages for that claim: place ACP in the position it would have been in had it been permitted to develop its property as proposed. The basis for the takings claim was that the passage of the 1995 USP did not advance a legitimate public interest and deprived ACP of all economically viable use of the property without compensation. The takings damages instruction directed the jury to award the value of the use of the property taken. The differences between the claims were reflected in the jury's verdict on damages—six million dollars for takings and more than eight million dollars for due process. It is further apparent that the right to receive meaningful process could not be redressed by the remedy for the takings claim—adequate compensation for deprivation of the use of property. We therefore conclude that the two claims were not coextensive and that ACP was under no obligation to seek condemnation and compensation before recovering damages for the due process violation.

5. Damages Under the Section 1983 Claim

{47} In Section 1983 cases, the plaintiff must prove a causal connection between the wrongful conduct and the injury in order to justify an award of compensatory damages. *Jacobs v. Meister*, 108 N.M. 488, 495-96, 775 P.2d 254, 261-62 (Ct. App. 1989), *disapproved of on other grounds by Carrillo v. Rostra*, 114 N.M. 607, 623 n. 16, 845 P.2d 130, 146 n. 16 (1992). The City contends that ACP's evidence relating to damages measured only the loss of profit that resulted from the inability to develop the property as planned. Specifically, the City argues that ACP was required to prove that if the City had provided due process, the 1995 USP would not have been approved

and that the ACP/Opus site plan would have been approved under the 1981 USP. We disagree.

{48} "It is recognized that a Section 1983 action is a species of tort liability, and that the common law of tort damages will be a starting point for Section 1983 damages[.]" *Wells v. County of Valencia*, 98 N.M. 3, 5, 644 P.2d 517, 519 (1982). Our Supreme Court has explained that according to long-established principles of tort law, "the purpose of compensatory damages is to make an injured person whole." *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 349, 805 P.2d 603, 616 (1991). The *Mendez* Court continued and stated that "one of the functions of compensatory damages is to indemnify the injured party against financial losses proximately caused by the negligence of another." *Id.* Thus, in the context of the present case, ACP was required to prove that its financial losses were caused by the City's actions.

{49} As we have explained, the City failed to provide adequate process to protect ACP's constitutionally protected property right and, therefore, the passage of the 1995 USP violated ACP's due process rights. Absent the improperly passed 1995 USP, the 1981 USP governed the ACP/Opus site plan. Consequently, we turn to whether the ACP/Opus site plan would have been approved under the 1981 USP.

{50} In *ACP III*, the Supreme Court determined that

> [t]he record shows that the [ACP/]Opus site plan, though it needed some adjustments (adjustments that were in the process of being made at the time the City imposed the moratorium to consider the 1995 [USP] amendments), complied with the requirements of the 1981 [USP] and

> was no different from a number of projects that the City had previously allowed under that sector plan.

2008-NMSC-025, ¶ 59, 144 N.M. 99, 184 P.3d 411. This statement by our Supreme Court is the law of the case. "Under the law of the case doctrine, if an appellate court has considered and passed upon a question of law and remanded the case for further proceedings, the legal question so resolved will not be determined in a different manner on a subsequent appeal." *Scanlon v. Las Cruces Pub. Sch.*, 2007-NMCA-150, ¶ 7, 143 N.M. 48, 172 P.3d 185 (alterations omitted) (internal quotation marks and citation omitted). We therefore conclude that the ACP/Opus site plan would have been approved according to the 1981 USP, *see ACP III*, 2008-NMSC-025, ¶ 58, 144 N.M. 99, 184 P.3d 411, and that ACP proved that its financial losses were caused by the City's failure to provide adequate process.

{51} The City also briefly contends that ACP did not prove a portion of the damages related to reimbursement of a percentage of funds used to construct a road. The Supreme Court did not address this argument in *ACP III*, and we thus consider whether ACP provided substantial evidence to support the jury's verdict that ACP's damages were caused by the City's actions. The City argues that there was no agreement that the City would reimburse ACP for construction of Loop Road, a road adjacent to the site, and that damages related to the road were improperly awarded based on ACP's assumption that the City would reimburse for road construction costs. The record supports ACP's assumption in that there was evidence at trial that the City had paid a percentage of another access

road, that the City had identified the cost of such a road as a cost to the City, and that the 1981 USP required public financing of the road. Accordingly, we conclude that ACP put on evidence to support the jury's assessment of damages in this regard.

B. Post-Judgment Interest

{52} We review the trial court's construction of the post-judgment interest statutes de novo. *Bird v. State Farm Mut. Auto. Ins. Co.*, 2007-NMCA-088, ¶ 36, 142 N.M. 346, 165 P.3d 343. New Mexico is somewhat unique in how it handles the payment of post-judgment interest by the state and its political subdivisions. We look to NMSA 1978, § 56-8-4(D) (2004), which exempts the state and political subdivisions from paying post-judgment interest unless otherwise provided by statute or case law. This statute has been construed narrowly, and in order for a prevailing party to recover post-judgment interest from the state or a political subdivision, our courts have required an explicit waiver of sovereign immunity. *Nava v. City of Santa Fe*, 2004-NMSC-039, ¶ 23, 136 N.M. 647, 103 P.3d 571 (refusing to award post-judgment interest when immunity from post-judgment interest is not expressly waived); *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 47, 125 N.M. 721, 965 P.2d 305 (same). The City argues that because Section 1983 and 42 U.S.C. § 1988 (2000) do not provide for post-judgment interest, the trial court improperly assessed post-judgment interest. ACP counters that post-judgment interest is mandatory in Section 1983 actions filed in federal court and that it should therefore be allowed in state proceedings. We agree with the City.

{53} As the City recognizes, post-judgment interest is routinely awarded in Section 1983 cases filed in

federal court. The basis for those awards, however, is 28 U.S.C. § 1961 (2000). *See, e.g., Transpower Constructors v. Grand River Dam Auth.*, 905 F.2d 1413, 1423 (10th Cir. 1990) ("[I]nterest shall be allowed on any money judgment in a civil case recovered in a [federal] district court." (internal quotation marks and citation omitted)); *see also* 28 U.S.C. § 451 (1982) (defining "district court" according to Title 5 of Chapter 28 U.S.C. in which 28 U.S.C.§ 132 (1963) describes a district court as "a court of record known as the United States District Court for the district"). Section 1961(c)(4) explicitly provides that it "shall not be construed to affect the interest on any judgment of any court not specified in this section." State courts are not specified in the section; therefore, there is no basis on which to apply the terms of Section 1961 to a Section 1983 claim filed in state court. It becomes clear that the federal precedent which permits post-judgment interest in Section 1983 claims does not supply the necessary authority to satisfy the mandate of New Mexico's Section 56-8-4(D). Apart from the requirements of Section 1961, ACP provides no federal or state authority to establish that prevailing parties in Section 1983 claims filed in state court are entitled to payments of post-judgment interest by a political subdivision of the state. We, too, have researched federal law and can find no additional authority for such a proposition.

{54} We have also conducted a survey of the law in other states. The majority of jurisdictions do permit the recovery of post-judgment interest against the state or political subdivisions, either by statute, by case law, or by both. *See* Alaska Stat. § 09.50.280 (1997); Ariz. Rev. Stat. § 12-823 (1984); 735 Ill. Comp. Stat. 5/2-1303 (1987); Ind. Code § 34-54-8-5 (1998); Kan. Stat. Ann. § 16-204 (1996); N.Y. State Finance

Law § 16 (1982); Okla. Stat. tit. 12, § 727.1(B) (2004); Tenn. Code Ann. § 9-8-307(d) (2005); *State of Ala. Highway Dep't v. Milton Constr. Co.*, 586 So.2d 872, 876 (Ala. 1991); *Ca. Fed. Sav. & Loan Ass'n v. City of Los Angeles*, 11 Cal.4th 342, 45 Cal.Rptr.2d 279, 902 P.2d 297, 300 (1995); *Palm Beach County v. Town of Palm Beach*, 579 So.2d 719, 720 (Fla. 1991); *Profit Recovery Group, USA, Inc. v. Comm'r, Dep't of Admin. & Fin. Servs.*, 2005 ME 58, ¶¶ 32-33, 871 A.2d 1237; *Md. State Highway Admin. v. Kim*, 353 Md. 313, 726 A.2d 238, 241 (1999); *Lienhard v. State*, 431 N.W.2d 861, 865-66 (Minn. 1988); *City of Jackson v. Williamson*, 95-CT-01072-SCT (¶¶14-15) 740 So.2d 818, 821-22 (Miss. 1999); *Nault v. N & L Dev. Co.*, 146 N.H. 35, 767 A.2d 406, 407, 409 (2001); *Judy v. Ohio Bureau of Motor Vehicles*, 100 Ohio St.3d 122, 2003-Ohio-5277, 797 N.E.2d 45, at ¶ 32; *Woods v. Dep't of Transp.*, 163 Pa.Cmwlth. 379, 641 A.2d 633, 635 (1994); *Mulvaney v. Napolitano*, 671 A.2d 312, 313 (R.I. 1995); *Hart v. Salt Lake County Comm'n*, 945 P.2d 125, 140 (Utah Ct.App. 1997).

{55} There are a handful of other states that, as a general proposition, do not permit successful plaintiffs to recover post-judgment interest on verdicts against the state. *See Chun v. Bd. of Trs. of the Employees' Ret. Sys.*, 106 Hawai'i 416, 106 P.3d 339, 356 (2005) (requiring express statutory relinquishment of the state's sovereign immunity from post-judgment interest); *Kenton County Fiscal Ct. v. Elfers*, 981 S.W.2d 553, 559-60 (Ky.Ct.App. 1998); *C & M Constr. Co. v. Commonwealth*, 396 Mass. 390, 486 N.E.2d 54, 56 (1985); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wash.2d 439, 842 P.2d 956, 966 (1993) (en banc). Montana is unique in that it provides a grace period of sorts. Its legislature has directed that under most circumstances, "if a governmental entity

pays a judgment within 2 years after the day on which the judgment is entered, no penalty or interest may be assessed." Mont. Code Ann. § 2-9-317 (1997).

{56} None of the states with law comparable to New Mexico have addressed the specific question of post-judgment interest in a Section 1983 case filed in state court. Our research thus reveals that there is no support for ACP's position that the City is required to pay post-judgment interest in this case.

{57} ACP argues that the denial of post-judgment interest for Section 1983 claims brought in state court will have a twofold effect. First, ACP quotes *Wells* to argue that "[t]he Legislature cannot enact a law which would have the practical effect of depriving a party of his rights secured by the United States Constitution." 98 N.M. at 7, 644 P.2d at 521. We note that Section 56-8-4(D) circumscribes only a party's ability to collect post-judgment interest against the state and political subdivisions; in no way does the statute prevent a party from bringing a cause of action against the state or its political subdivision in order to vindicate constitutional rights. Second, ACP contends that "[s]tate law that creates different outcomes in federal and state court cannot be given effect." For support, ACP cites *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988). *Felder* considered whether a party must comply with a state's pleading procedures in order to properly bring a Section 1983 claim. *Felder*, 487 U.S. at 138, 108 S.Ct. 2302. The United States Supreme Court held that

> [b]ecause the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of [Section] 1983, and because its enforcement in such actions will

> frequently and predictably produce different outcomes in [Section] 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is preempted when the [Section] 1983 action is brought in a state court.

Id. We do not believe that the New Mexico prohibition against the recovery of post-judgment interest against the state and political subdivisions "conflicts in both its purpose and effects with the remedial objectives of [Section] 1983." *Id.* The remedial objectives of Section 1983 are certainly achieved when a plaintiff successfully brings suit for damages against the state to vindicate constitutional rights. The recovery of post-judgment interest operates only as an enforcement mechanism to encourage the timely payment of damages after judgment has been entered. *See Bird*, 2007-NMCA-088, ¶ 42, 142 N.M. 346, 165 P.3d 343 ("An award of post-judgment interest serves three purposes: compensating the plaintiff for being deprived of compensation from the time of the judgment until payment . . . by the defendant, discouraging unsuccessful defendants from pursuing frivolous appeals, and minimizing court supervision of the execution of judgments." (internal quotation marks and citation omitted)). We therefore hold that the trial court improperly granted ACP post-judgment interest. Because post-judgment interest is not permissible under Section 56-8-4(D) in these circumstances, we need not consider whether the interest was properly assessed according to the state, and not the federal, interest rate.

C. Attorney Fees and Costs

1. Recovery Under Section 1988 For State Law Claims

{58} The City first contends that the trial court improperly awarded attorney fees for the first administrative appeal under Section 1988, which only allows recovery for federal civil rights actions. *See N.C. Dep't of Transp. v. Crest St. Cmty. Council, Inc.*, 479 U.S. 6, 12, 107 S.Ct. 336, 93 L.Ed.2d 188 (1986) ("On its face, [Section] 1988 does not authorize a court to award attorney's fees except in an action to enforce the listed civil rights laws."); *Bogan v. Sandoval County Planning & Zoning Comm'n*, 119 N.M. 334, 345, 890 P.2d 395, 406 (Ct. App. 1994) (explaining that a "plaintiff must prevail on some federal civil rights claim in order to be eligible for a fee award" under Section 1988). We review the trial court's award of attorney fees for abuse of discretion. *Nava*, 2004-NMSC-039, ¶ 24, 136 N.M. 647, 103 P.3d 571. In the first administrative appeal, the trial court determined that the City was required to review ACP's proposal under the 1981 USP and not the 1995 USP. The City's position is that no part of the first administrative appeal was necessary in order to vindicate ACP's civil rights. Instead, the City claims that the "sole issue under the petition . . . was an appellate review of the action of the City Council to determine the validity of a zoning decision—the adoption of the 1995 [USP]."

{59} ACP contends that without the work performed for the first administrative appeal, the civil rights claim would not have been successful. The trial court agreed and found that "virtually everything [in the first administrative appeal] focused on whether there was a downzone." As we discussed above,

ACP's identifiable property right is to be free from downzoning unless the City can establish certain criteria. Therefore, there was no abuse of discretion to permit attorney fees for the first administrative appeal because that appeal decided an issue that was crucial to the later and successful constitutional claim. *See N.C. Dep't of Transp.*, 479 U.S. at 15, 107 S.Ct. 336 ("A court hearing one of the civil rights claims covered by [Section] 1988 may still award attorney's fees for time spent on administrative proceedings to enforce the civil rights claim prior to the litigation.").

2. Costs

{60} The City next argues that specific costs awarded by the trial court were either (1) improperly categorized in the cost bill or (2) not recoverable under state or federal law. We review a trial court's determination of costs for abuse of discretion. *Bird*, 2007-NMCA-088, ¶ 27, 142 N.M. 346, 165 P.3d 343. In a Section 1983 action brought in state court, the prevailing party may recover some expenses of litigation under either federal or state law. Federal law permits the prevailing party to recover attorney fees under Section 1988, and fees may include "reasonable out-of-pocket expenses not normally absorbed as part of law firm overhead." *Brown v. Gray*, 227 F.3d 1278, 1297 (10th Cir. 2000). These costs under Section 1988 are considered to be included in the award of attorney fees; therefore, amounts paid to third parties who are not attorneys are not recoverable under Section 1988. *Brown*, 227 F.3d at 1297. However, other costs may be awarded under the general costs statute. *See id.* Also, Rule 1-054(D)(2) NMRA permits the recovery of certain costs under state law. It includes the recovery of the following expenses under certain

circumstances: filing fees; fees for service of summonses, subpoenas, writs and other service of process; jury fees; transcript fees including those for daily transcripts and transcripts of hearings prior or subsequent to trial; the cost of a deposition if any part is used at trial or in successful support or defense of a motion for summary judgment; witness mileage or travel fare and per diem expenses; expert witness fees for services; translator fees; reasonable expenses involved in the production of exhibits admitted into evidence; official certification fees for documents admitted into evidence; and interpreter fees for judicial proceedings and depositions.

{61} The City contends that ACP improperly categorized some expenses under Section 1988 that were not recoverable under that section and other expenses under Rule 1-054 that were not permitted under that rule. The trial court concluded that any improper categorization of the requests did not "require that the request be disallowed [i]f it is otherwise compensable under the law." Although ACP acknowledges that it claimed some items under both statutes, it repeatedly asserted that double recovery was not sought for expenses that were claimed under both laws. We agree with the trial court that if certain costs were permissible under any law—federal or state—ACP was entitled to recover those costs. *See* Rule 1-054(D)(1) ("[C]osts, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs[.]"). We therefore review each of the City's arguments regarding whether a particular expense is allowable under either Section 1988 or Rule 1-054(D).

{62} The City disputes the trial court's award of copy costs, subpoena fees, and transcript fees. These

arguments are without merit because either Rule 1-054(D)(2) or Section 1988 permit the recovery of these costs, and the City admits that copy costs are billed through as attorney fees. *See Case v. Unified School Dist. No. 233*, 157 F.3d 1243, 1257 (10th Cir. 1998) ("Reasonable expenses incurred in representing a client in a civil rights case should be included in the attorney's fee award if such expenses are usually billed in addition to the attorney's hourly rate."); *see also* Rule 1-054(D)(2)(b) (permitting the recovery of subpoena fees); Rule 1-054(D)(2)(d) (permitting the recovery of transcript fees); *H-B-S P'ship v. Aircoa Hospitality Servs., Inc.*, 2008-NMCA-013, ¶ 27, 143 N.M. 404, 176 P.3d 1136 (holding that Rule 1-054(D)(2)(d) does not require advance approval of transcript requests in order for the cost to be recoverable).

{63} The City also challenges the trial court's award of mediation fees and deposition costs. Section 1988 and Rule 1-054(D) are silent with regard to mediation costs. New Mexico trial courts are cautioned that "[c]osts generally are recoverable only as allowed by statute, Supreme Court rule[,] and case law," Rule 1-054(D)(2), and "[w]e therefore expect . . . courts to exercise their discretion sparingly with regard to costs that are not specifically authorized." *H-S-B P'Ship*, 2008-NMCA-013, ¶ 24, 143 N.M. 404, 176 P.3d 1136. Nevertheless, we conclude that the trial court was within its discretion to award ACP mediation costs because the court "explain[ed] the circumstances justifying the award." *Id.* (internal quotation marks and citation omitted). The trial court informed the parties that ACP was permitted to recover mediation fees because the mediation was court-ordered and because the City did not participate in the mediation with good faith. The trial court

made a similar award for deposition costs and expenses. Although Rule 1-054(D)(2)(e) normally requires that depositions be used at trial or in a successful motion for summary judgment in order for the prevailing party to recover the costs, the trial court in the present case permitted the recovery of all deposition costs. The court explained that this was a complicated case and that the attorneys involved had to sift through a great deal of information in order to determine what testimony was relevant and not duplicative. The trial court noted that none of the depositions taken were unreasonable and as a result awarded all deposition costs under Rule 1-054. Under these circumstances, we see no abuse of discretion in the awards for mediation and deposition costs. *See H-S-B P'Ship*, 2008-NMCA-013, ¶ 28, 143 N.M. 404, 176 P.3d 1136 ("Because the district court affirmatively explained its reasons justifying any deviation from Rule 1-054(D)(2), we affirm its allowance of the . . . costs.").

{64} In its final argument, the City contends that the trial court improperly allowed ACP to recover costs related to expert witnesses. The parties do not dispute that Section 1988 does not permit recovery for expert witnesses in Section 1983 actions. *See* § 1988 (permitting the recovery of expert witness fees in proceedings to enforce the provisions of 42 U.S.C. §§ 1981 or 1981a (2000)—but omitting reference to Section 1983); *see also James v. Sears, Roebuck & Co.*, 21 F.3d 989, 995 (10th Cir. 1994) ("There must be an explicit statutory authorization before expert witness fees will be awarded."). ACP characterized witnesses Phil Garcia and William Kraemer as paralegals and thereby recovered those costs under Section 1988. The City argues that these witnesses were experts, and costs are therefore not recoverable.

The trial court did not permit ACP to recover for all of the work performed by these witnesses because some of the work was more akin to expert work than paralegal work. It was not contrary to logic and reason for the trial court to carefully examine the work done by these witnesses, conclude that some work was investigatory, and permit costs for that work. *See Case*, 157 F.3d at 1249 (applying Section 1988 and concluding that "[a]s to services provided by non-lawyers, if law clerk and paralegal services are . . . not reflected in the [attorney's fee], the court may award them separately as part of the fee for legal services" (some alterations in original) (internal quotation marks and citation omitted)). Accordingly, we hold that the trial court did not abuse its discretion by permitting the recovery by ACP of the costs related to Garcia and Kraemer.

{65} The City also objects to the recovery of costs for Rainhart, Dahlstrom, and Ricker. The trial court found that Rainhart and Ricker testified at trial as experts and that the City did not object. It was not therefore not an abuse of discretion to allow ACP to recover costs for those experts. *See* NMSA 1978, § 38-6-4(B) (1983); *Fernandez v. Española Pub. Sch. Dist.*, 2005-NMSC-026, ¶ 5, 138 N.M. 283, 119 P.3d 163 (acknowledging that a party may recover costs for experts who testify in person or by deposition). We observe that Dahlstrom did not testify by deposition or in person at trial. Instead, ACP argues that it should recover costs for the time that Dahlstrom spent preparing an affidavit for a summary judgment motion. Generally, the preparation of an affidavit by an expert is insufficient to allow the recovery of costs for expert testimony under Rule 1-054(D)(2)(g). *Pierce v. State*, 121 N.M. 212, 231, 910 P.2d 288, 307 (1995). Nevertheless, the trial court questioned the parties

about Dahlstrom's work in this case and learned that the preparation of the affidavit required review of the entire, not insubstantial, record. The trial court's rationale described above, about the complicated nature of this case, also supports the decision to allow Dahlstnom's work to be recovered as costs. As a result, the trial court concluded that the costs were reasonable and we agree. *See H-S-B P'Ship*, 2008-NMCA-013, ¶ 24, 143 N.M. 404, 176 P.3d 1136 ("[C]ourts have the discretion to grant a prevailing party the necessary and reasonable costs incurred in litigating a case.").

III. CONCLUSION

{66} We affirm the trial court and the jury verdict on the Section 1983 claim and the award of damages, costs, and fees, with the exception of the award of post-judgment interest. We remand the matter to the trial court for an entry of judgment consistent with this opinion.

{67} IT IS SO ORDERED.

/s/ CELIA FOY CASTILLO
CELIA FOY CASTILLO, Judge

WE CONCUR:

/s/ MICHAEL D. BUSTAMANTE
MICHAEL D. BUSTAMANTE, Judge

/s/ LYNN PICKARD
LYNN PICKARD, Judge Pro Tempore

APPENDIX B

SUPREME COURT OF NEW MEXICO

Nos. 29,791, 29,799

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent-Respondent.

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent-Respondent.

Feb. 18, 2008.
Rehearing Denied May 2, 2008.

OPINION

BOSSON, *Justice.*

{1} In *Miller v. City of Albuquerque*, 89 N.M. 503, 554 P.2d 665 (1976), this Court held that when a zoning authority rezones a piece of property to a more restrictive use (known as "downzoning"), the zone change must be justified by either a change in the surrounding community or a mistake in the original zoning. We later reaffirmed this rule in *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982),

and applied it to a rezoning pursuant to a sector plan. In this case, the City of Albuquerque adopted a new sector plan that restricted the uses on Petitioner's property. Petitioner argues, and the district court agreed, that, in adopting this sector plan, the City downzoned Petitioner's property without complying with *Miller* and in violation of Petitioner's procedural due process rights. A jury also agreed with Petitioner and awarded damages under 42 U.S.C. § 1983.

{2} The City claims, and the Court of Appeals agreed in reversing the damages award, that *Miller* and *Davis* do not apply to the City's zoning action because (1) the adoption of the sector plan in this case was a legislative act, and (2) the zone change was done pursuant to a text amendment, as opposed to a map amendment, and was therefore not the type of zone change to which *Miller* and *Davis* apply. *See Albuquerque Commons P'ship v. City Council of the City of Albuquerque*, 2006-NMCA-143, 140 N.M. 751, 149 P.3d 67, *cert granted*, 2006-NMCERT-011, 140 N.M. 846, 149 P.3d 943 (*Commons II*). We now hold that the City's actions did constitute a downzoning of Petitioner's property without complying with important standards set forth in *Miller* and *Davis*, which we reaffirm in this Opinion. Accordingly, we reverse the Court of Appeals and remand for further proceedings.

BACKGROUND

{3} The facts pertinent to this appeal are set forth thoroughly and comprehensively in the Court of Appeals opinion, and we refer only to those portions of the record that are necessary to resolve this appeal.

{4} From 1987 to 1998, Petitioner Albuquerque Commons Partnership ("ACP") held a long-term ground

lease for the old St. Pius High School site in Albuquerque, located north of the Winrock Shopping Center. This property is part of an approximately 460-acre area designated by the City's Comprehensive Plan as the Uptown Sector, one of several urban centers in the city. When ACP leased the 28-acre parcel from the Archdiocese of Santa Fe, the zoning was governed by the 1981 Uptown Sector Plan, under which the majority of the 460 acres, including ACP's property, was zoned SU-3, with the periphery being zoned either SU-2 or R-1. "SU-3 zoning provides suitable sites for high-intensity mixed uses—commercial, office, service, and residential." *Commons II*, 2006-NMCA-143, ¶ 6, 140 N.M. 751, 149 P.3d 67. Important to our later analysis, the 1981 Uptown Sector Plan standards did not mandate minimum development densities, mixed uses, or parking structures, and did not prohibit free-standing buildings, limit the amount of retail use in a development, or require that an entire project be built at once instead of in phases.

{5} From the time the City adopted the 1981 Uptown Sector Plan until it passed the 1995 amendments that are the subject of this suit, the City approved several suburban retail projects within the same area, including a Beall's, a Dillard's addition, a theater, mall expansion, and three new restaurants (all at Winrock), as well as three new restaurants and two new stand-alone retail projects outside Winrock. The City also approved a zone change allowing Toys R Us to demolish office space and replace it with a new stand-alone "medium box" retail building. As we shall see, these projects would not have been allowable under the 1995 Uptown Sector Plan amendments.

{6} In 1991, ACP decided to sell its leasehold, selecting Opus Southwest Corporation ("Opus") to assume development of the property. Opus proposed to either purchase or lease the property if it could obtain approval of its site development plan. In June 1994, Opus submitted a site plan for a stand-alone retail project on ACP's property. This proposal also included a request for a zone map amendment because the site plan included property in the SU-2 zone. Due to strong public opposition, Opus withdrew its proposal on August 31, 1994.

{7} Two weeks after Opus withdrew its first site plan proposal, the City passed Memorial M7-1994, requesting a comprehensive public review and revision of the 1981 Uptown Sector Plan. The City stated its desire to fulfill the vision of the Comprehensive Plan and observed that the 1981 Uptown Sector Plan needed to be revised and strengthened. Thus, the City "requested that the planning department present its 'plan-amendment recommendations and a record of the public review' of the [1981 Uptown Sector Plan] to the City's Environmental Planning Commission (EPC) for consideration by the end of April 1995." *Commons II*, 2006-NMCA-143, ¶ 10, 140 N.M. 751, 149 P.3d 67.

{8} Shortly thereafter, on September 30, 1994, Opus submitted its second site plan, this time proposing a smaller, 17.90-acre low-density "big-box" retail project. This project was to be located entirely within the SU-3 zone and would not require any zone map amendments. *Id.* The Planning Department's initial reports to the EPC on the project stated that the retail uses were allowed by the 1981 Uptown Sector Plan, and proposed consistent EPC findings.

{9} The Opus site plan was originally set for a hearing before the EPC in November 1994, but Opus agreed to a deferral of the hearing until January 1995. EPC then deferred consideration of the site plan until February 9, 1995, due to information that the City was considering a moratorium on development in the Uptown Sector pending revision of the 1981 Uptown Sector Plan. On February 6, 1995, the City Council passed a resolution placing a four-month moratorium on all development within the Uptown Sector.

{10} After instituting the moratorium and deferring consideration of ACP's project, the Planning Department implemented "a fast-track schedule with specific deadlines to prepare information necessary to evaluate proposed revisions to the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 15, 140 N.M. 751, 149 P.3d 67. The proposed revisions split the existing SU-3 zone into two new sub-zones: the "Intense Core" and the "Outside of Intense Core," separated by the Loop Road. Though the zoning classification remained the same for the entire area, additional regulations applicable only to the Intense Core were significantly more restrictive than those under the 1981 Uptown Sector Plan or in the Outside of Intense Core. The newly-proposed Intense Core regulations prohibited free-standing retail, imposed limitations on the size of retail buildings, and required mixed uses, with retail comprising no more than 10 percent of space built on a site. Additionally, the Intense Core regulations required a specific density of uses, structured parking, and, significantly, construction of an entire project at once, without phasing to match construction demand. In contrast, the Outside of Intense Core regulations allowed retail uses to continue at existing density. Retail was

limited to 10 percent of new space, but "redevelopment/replacement of existing space" was exempted.

{11} ACP's leased property was located entirely within the Intense Core zone. Only two other property owners owned land in the Intense Core, and ACP's property made up two-thirds of the affected land. Further, though all three tracts of land were vacant, only ACP had a pending site plan submitted to the City. As a practical matter, therefore, the new regulations affected primarily ACP and its leasehold interest.

{12} A series of public hearings was scheduled before the EPC, the Land Use Planning and Zoning Committee (LUPZ), and the City Council to consider the amendments. The City initially claimed that the purpose of the amendments was to improve air quality. While the EPC agreed that the 1981 Uptown Sector Plan was in need of revision, it recommended against adopting the 1995 Uptown Sector Plan, finding that "the air pollution problem in the Uptown area would not be significantly affected by the land uses advocated." The EPC also observed that testimony from developers indicated that the Floor Area Ratio minimums and maximums would make development uneconomical. Finally, the EPC found that the proposed amendments to the 1981 Uptown Sector Plan did not meet the requirements for zone changes set forth in the City's Resolution 270-1980, which sets forth policies and criteria that the City must follow when deciding zone change applications. More will be said later about Resolution 270-1980.

{13} The EPC's findings were discussed at a later meeting of the LUPZ. At this hearing, the city attorney stated his opinion that the City did not have

to comply with the requirements of Resolution 270-1980 because those requirements only apply to zone map amendments and the 1995 Uptown Sector Plan amendments were text amendments. A planner with the Environmental Health Division challenged the EPC's finding that the amendments would not significantly improve air quality, stating that the finding was based only on selected data and explaining that when all data were used, mixed uses, together with any amount of transportation management strategies, would result in fewer exceedances of the carbon monoxide standards.[1] Three people with experience in the real estate or financial field also testified that the vacant land in the Intense Core could develop under the 1995 Uptown Sector Plan restrictions. At the close of the testimony, one of the councilors stated that the issues underlying EPC's recommendation against adoption of the 1995 Uptown Sector Plan had been significantly addressed, and LUPZ voted to recommend passage of the revised sector plan.

{14} The City Council then held two public hearings on the 1995 Uptown Sector Plan and on June 19, 1995, the Council voted 7-0 in favor of adopting the amended sector plan. In its resolution adopting the 1995 Uptown Sector Plan, the Council recited introductory "whereas" paragraphs that tracked similar paragraphs in the Council's memorial directing the 1981 Uptown Sector Plan's revision. These broad statements did not address the specific criteria that

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[1] Though this testimony indicates that air quality would be improved with mixed uses combined with transportation management strategies, the district court found that no traffic demand management measures were included in the 1995 Uptown Sector Plan.

apply to rezonings, as will be discussed later in this Opinion. Pursuant to the City's adoption of the 1995 Uptown Sector Plan, the EPC voted to defer consideration of Opus' site plan indefinitely because it did not comply with the revised sector plan.

{15} In July 1995, ACP sought district court review under NMSA 1978, Section 3-21-9 (1965), of the City's decision to adopt the 1995 Uptown Sector Plan. That petition was subsequently amended to add claims under § 1983 for damages allegedly caused by the City's denial of ACP's rights to substantive and procedural due process in the adoption of the 1995 Uptown Sector Plan, for inverse condemnation under state law, and for an unconstitutional taking in violation of the Fifth Amendment. The district court found that the 1995 Uptown Sector Plan amendments downzoned ACP's property and that the City had not complied with applicable state law, as well as its own policies and procedures under Resolution 270-1980, in enacting the new sector plan. Therefore, the court held that the new restrictions in the 1995 Uptown Sector Plan were invalid as applied to ACP and remanded the case to the City for consideration of Opus' site plan under the 1981 Uptown Sector Plan. The court also found that ACP suffered a deprivation of its right to procedural due process, and thus allowed ACP to go forward with its § 1983 damages claim as well as its federal takings claim. The court dismissed the state takings claim along with the § 1983 claim based on substantive due process, ruling that the decision to adopt the 1995 Uptown Sector Plan was not arbitrary and capricious.

{16} While the damages claims proceeded in the district court, ACP requested that the City Council conduct a hearing on the Opus site plan under the

1981 Uptown Sector Plan, pursuant to the district court's ruling in the first administrative appeal. The EPC denied approval of the plan, and in March 2000, the City Council affirmed the EPC's decision and denied approval under the 1981 Uptown Sector Plan.

{17} ACP then sought review of the City Council's ruling in a second administrative appeal to the district court pursuant to NMSA 1978, Section 39-3-1.1 (1998). The district court reversed the City Council's decision denying approval of the site plan under the 1981 Uptown Sector Plan and ordered the City Council to approve the site plan. The City sought an immediate appeal of the district court's ruling in the second administrative appeal to the Court of Appeals, but on October 3, 2002, the Court of Appeals ruled that the order was non-final and not appealable because "ACP's claim for damages for the violation of procedural due process claim [sic][was] still pending." *Albuquerque Commons P'ship v. City of Albuquerque*, 2003-NMCA-022, ¶ 11, 133 N.M. 226, 62 P.3d 317 (Ct.App.2002) (*Commons I*).

{18} In February 2003, ACP's federal procedural due process and takings claims were tried to a jury. "The jury was instructed that the law of the case was that ACP's property had been downzoned and that ACP was entitled to a quasi-judicial hearing before the property was downzoned." *Commons II*, 2006-NMCA- 143, ¶ 28, 140 N.M. 751, 149 P.3d 67. The jury returned a verdict in favor of ACP on both claims. The verdict for damages for the takings claim was dismissed pursuant to the election of remedies doctrine, and on April 11, 2003, the district court entered final judgment against the City on the due process verdict in the amount of $8,349,095.00.

{19} The City then sought certiorari review of both district court administrative reviews in the Court of Appeals, and also appealed from the district court judgment on the jury verdict. *Commons II*, 2006-NMCA-143, ¶ 29, 140 N.M. 751, 149 P.3d 67. The Court of Appeals granted the petitions seeking review of the two administrative appeals and consolidated all three appeals. *Id.*

{20} The Court of Appeals overturned all three district court decisions. With regard to the first administrative appeal, the Court of Appeals reversed the district court, and held that the 1995 Uptown Sector Plan amendments were legislative text amendments that did not downzone ACP's property, did not need to satisfy the standards of *Miller* and *Davis*, and were therefore valid as applied to ACP. *Id.* ¶¶ 39, 67. Because the other two decisions—the order requiring the City to approve the site plan under the 1981 Uptown Sector Plan and the § 1983 verdict—were based on the district court's initial conclusion with regard to the 1995 Uptown Sector Plan, the Court of Appeals reversed those decisions as well. *Id.* ¶ 78. We granted certiorari to address issues relating to procedural fairness in the passage of the 1995 Uptown Sector Plan amendments and, in particular, the continued applicability of our precedent in *Miller* and *Davis*.

DISCUSSION

First Administrative Appeal

{21} We begin with the first administrative appeal challenging the City's adoption of the 1995 Uptown Sector Plan and its application of the amended sector plan to ACP's proposed project. The Court of Appeals viewed the "pivotal" issue in this matter to be

whether the City's action in adopting the 1995 Uptown Sector Plan was legislative or quasi-judicial in nature. *See Commons II*, 2006-NMCA-143, ¶ 33, 140 N.M. 751, 149 P.3d 67. Finding that the City's action was legislative, the Court of Appeals went on to determine that the City followed proper procedures in adopting the 1995 Uptown Sector Plan, and that there was no downzoning of ACP's property to which the rules pertinent to such actions would apply. *See id.* ¶ 78.

{22} Instead of evaluating the nature of the City's action as quasi-judicial or legislative, we begin with whether the City's adoption of the 1995 Uptown Sector Plan Intense Core restrictions effected a downzoning of ACP's property. We view this to be the critical inquiry because its outcome will determine what processes the City was required to employ, what it was required to show, and how much discretion it had in making its decision. The effect of the City's action on the property owner—whether it constitutes a downzoning or not—determines the degree of process due, not the label the City employs. The City acknowledges that it did not follow quasi-judicial procedures and did not attempt to satisfy the criteria for a downzoning; it simply denies that a downzoning took place. Thus, if the 1995 Uptown Sector Plan did not downzone ACP's property, there was nothing wrong with the City's adoption of that sector plan by a legislative rather than a quasi-judicial process. On the other hand, if the 1995 Uptown Sector Plan amendments did effect a downzoning of ACP's property, then those amendments will be invalid as applied to ACP because they were not justified according to the applicable standards, or passed pursuant to quasi-judicial proce-

dures designed to safeguard the affected property owner's due process rights.

{23} We therefore begin by examining New Mexico's law on rezoning and the standards and procedures that apply to rezoning actions. We then address the City's arguments as to why those standards and procedures do not apply to the adoption of the 1995 Uptown Sector Plan amendments. In doing so, our focus is not on how the City characterized its zoning action and what procedures it used, but on what kind of action the City *in fact* took, and what procedural protections are required to accompany such actions.

New Mexico Law on Rezoning: Downzoning and the Miller *Rule*

{24} New Mexico courts use the term "downzoning" to describe rezoning to a more restrictive use. *See KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 ("*KOB*") (citing *Davis*, 98 N.M. at 320-21, 648 P.2d at 778-79, for the proposition that "downzoning consists of the rezoning of a property to a more restrictive use"). The term as it has been employed by our courts is essentially a term of art that implies a rezoning action instituted by someone other than the landowner—most often the municipality itself—that is directed at a single parcel or a small number of parcels within a larger zone area, and that expands the restrictions on the use of the property. *See Commons II*, 2006-NMCA-143, ¶ 68, 140 N.M. 751, 149 P.3d 67 ("'Downzoning' is an informal word of art that almost never appears in the statutes or ordinances."); see *also Davis*, 98 N.M. at 321, 648 P.2d at 779 (noting that *Miller* involved a downzoning when the landowner's property was rezoned to a more restrictive use upon the City's

initiative); 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* ("Ziegler") § 38:13, at 38-10 to -11 (2005) (noting that "downzonings are seldom initiated by the rezoned property owner, rather, they usually occur at the behest of neighbors or community groups, or at the initiative of the local government itself"). Such a targeted rezoning action is also called a "piecemeal rezoning" and stands in contrast to a "comprehensive rezoning," which "affect[s] a substantial portion of land within the zoning jurisdiction belonging to many landowners." Ziegler § 38:14, at 38-12; *see also KOB*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 (recognizing no downzoning when rezoning involved amendments that applied city-wide); *Turner v. Bd. of County Supervisors of Prince William County*, 263 Va. 283, 559 S.E.2d 683, 685 (2002) (court found that ordinance was "piecemeal downzoning" because it was initiated by the county board, it selectively targeted certain property, and it reduced the potential density of the property owners' land below that recommended by the county's master plan).

{25} New Mexico courts have often used the term "downzoning" as shorthand for those actions that require justification pursuant to the "change or mistake" rule and the zoning authority's own regulations for zoning amendments, which in this case are contained in the City's Resolution 270-1980. The "change or mistake" rule, adopted by this Court in *Miller* and reaffirmed in *Davis*, dictates that the proponent of a zoning change, in this instance the City, must show that such a change is justified due to either a change in conditions in the community or a mistake in the original zoning. *Miller*, 89 N.M. at 506, 554 P.2d at 668 ("The fundamental justification for an amendatory or repealing zoning ordinance is a

change of conditions . . . necessary to protect the public interest [or to] cover and perfect previous defective ordinances or correct mistakes or injustices therein." (Quoted authority omitted.)); *see also Davis*, 98 N.M. at 321, 648 P.2d at 779 (declining to overrule *Miller* and rejecting City's argument that the change or mistake rule should not apply to rezonings accomplished pursuant to amendments to a sector plan). The rule evidences a concern over the stability of zoning regulations and a landowner's right to rely on existing zoning rules. *See Miller*, 89 N.M. at 506, 554 P.2d at 668 (noting that the change or mistake rule supports the "desirable stability of zoning classifications upon which the property owner has a right to rely, since property may be purchased and sold or uses of the property undertaken in reliance on existing classifications"). As we acknowledged in *Miller*, while a property owner does not have a vested right in a particular zoning classification, before a piecemeal zoning change is implemented, due consideration must be given to whether such a change is justified, particularly when the zoning authority and not the landowner seeks to rezone a piece of property. *Id.*

{26} New Mexico courts have not limited the *Miller* rule's applicability to piecemeal rezonings of single parcels, but have extended it to downzonings done pursuant to a comprehensive plan, and even to an upzoning of a specific property upon petition of the landowner.[2] *See, e.g., Davis*, 98 N.M. at 321, 648 P.2d at 779 (noting that the fact that the downzoning in

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[2] An upzoning is a zoning action that rezones a parcel to a less restrictive use. Such zoning actions are usually favored by landowners as they give greater flexibility in the use of property.

that case was done pursuant to a comprehensive plan did not, in itself, distinguish that case from *Miller*); *W. Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶¶ 17-18, 122 N.M. 495, 927 P.2d 529 (holding that an amendment to a sector plan rezoned landowner's property to a less restrictive use, and thus the City had to justify the change in accordance with the *Miller* rule and the City's Resolution 270-1980), *superceded by statute as stated in C.F.T. Dev., LLC v. Bd. of County Comm'rs of Torrance County*, 2001-NMCA-069, ¶ 14, 130 N.M. 775, 32 P.3d 784. The characteristic common to those zoning actions which we have held must be justified by a change or mistake appears to be that they have focused on specific properties or small groups of properties within an otherwise similarly situated class, restricting or allowing uses in ways that do not apply to the surrounding area or similar areas within the city.

{27} To illustrate, in *Davis* we held that a downzoning of an eight-block area pursuant to a sector plan amendment was subject to the change or mistake rule. 98 N.M. at 321-22, 648 P.2d at 779-80. Our decision was informed by evidence that the eight blocks appeared to have been singled out from the rest of the sector plan, being severely downzoned while the other areas within the sector plan were allowed to continue at substantially the same density and with the same types of structures. *Id.* Similarly, in *W. Old Town*, 1996-NMCA-107, ¶ 21, 122 N.M. 495, 927 P.2d 529, our Court of Appeals held that the *Miller* rule applied to the City's approval of an upzoning of a landowner's property when the City "attempted to limit the effect of the rezoning to [that] property alone as a unique situation."

{28} Also applicable to zoning amendments are the City's own rules and policies set forth in Resolution 270-1980. *See W. Old Town*, 1996-NMCA-107, ¶ 18, 122 N.M. 495, 927 P.2d 529. This provision is quoted in its entirety in the Court of Appeals opinion. *See Commons II*, 2006-NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. Resolution 270-1980 tracks the change or mistake rule, requiring that the proponent of the zoning change "demonstrate that the existing zoning is inappropriate because (1) there was an error when the existing zone map pattern was created, or (2) changed neighborhood or community conditions justify the change." *Commons II*, 2006-NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. The Resolution also recognizes an additional criterion that can justify a zoning amendment, stating that the proponent of the change may show that "a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply." *Id.*

{29} The relationship between the *Miller* rule and Resolution 270-1980 is unclear; *Miller* and *Davis* appear to speak only in terms of change or mistake as the exclusive criteria upon which a zoning amendment may be based. However, upon closer reading, both cases suggest that a demonstration of a change in the community or a mistake in the original zoning are not the only valid justifications for a zoning change. *Miller* expresses a primary concern over "the desirable stability of zoning classifications upon which the property owner has a right to rely, since property may be purchased and sold." 89 N.M. at 506, 554 P.2d at 668. The change or mistake criteria are referred to as "principles and considerations [that] must be taken into account, particularly when the zoning change of a piece of property is sought by the

zoning authority instead of by the owner of the property affected." *Id.* Thus, change or mistake were not envisioned as strict, all-encompassing requirements, without which a zoning change will never be justified. Similarly, in *Davis*, we recognized that "a more reasonable downzone or a more reasonable comprehensive plan might be sufficient to remove the case from the *Miller* requirements of 'mistake or change.'" 98 N.M. at 321, 648 P.2d at 779. Thus, the third criterion in Resolution 270-1980 is not necessarily incompatible with the principles set forth in *Miller* and *Davis*.

{30} The enhanced procedures that are required to accompany proposed zoning changes directed at a small number of properties constitute the primary protection for the landowner. Rigid application of the *Miller* rule to those proposed changes is therefore unnecessary and can unduly impede the zoning authority's ability to make zoning decisions that are ultimately beneficial to the community at large. Resolution 270-1980 adequately accommodates the need for planning and zoning flexibility. Therefore, without adopting any absolute standards or mechanical tests, we recognize that a municipality may be able to justify an amendment that downzones a particular property by demonstrating that the change is "more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan." Resolution 270-1980; *accord Commons II*, 2006- NMCA-143, ¶ 64, 140 N.M. 751, 149 P.3d 67. The proof in such a case would have to show, at a minimum, that "(1) there is a public need for a change of the kind in question, and (2) that need will be best served by changing the classification of the particular piece of property in question as compared with other available property." *Fasano v. Bd. of*

County Comm'rs of Washington County, 264 Or. 574, 507 P.2d 23, 28 (1973), *superceded by statute as stated in Menges v. Bd. of County Comm'rs of Jackson County*, 44 Or.App. 603, 606 P.2d 681 (1980) (en banc).

Quasi-Judicial Versus Legislative Zoning Decisions

{31} The essence of ACP's challenge to the 1995 Uptown Sector Plan Intense Core restrictions is that ACP's property was singled out for a downzoning and the City failed to follow the proper procedures or comply with the requisite criteria in adopting those amendments. The nature of a particular zoning action as either legislative or quasi-judicial is determinative of the procedures that the zoning authority is required to follow in implementing that action. *See Hart v. City of Albuquerque*, 1999-NMCA-043, ¶ 13, 126 N.M. 753, 975 P.2d 366 ("Zoning decisions can be either legislative or quasi-judicial depending upon the impact of the zoning change."); Ziegler § 40:22, at 40-49 (noting that characterization of a rezoning as quasi-judicial can result in the parties being entitled to greater procedural rights and enabling reviewing courts to conduct a closer scrutiny of the merits of the rezoning decision). We note that while we use the labels "legislative" and "quasi-judicial" for the sake of convenience, the real question here is whether the City's adoption of the 1995 Uptown Sector Plan amendments was fair overall, affording ACP adequate due process of law. *See Hacker v. Baesler*, 812 S.W.2d 706, 709 (Ky.1991) ("Much argument has been offered as to whether [a zoning map] amendment process ought to be labeled legislative, judicial, [or] quasi-judicial. [T]he ultimate question is, considering the nature, subject, and purpose of the proceeding and the constitutional rights of the par-

ticipants, how much process of law is due?"); *Ed Zaagman, Inc. v. City of Kentwood*, 406 Mich. 137, 277 N.W.2d 475, 499 n. 33 (1979) (Levin, J., for affirmance and remand) (cautioning that discussion of the labels "legislative" and "quasi-judicial" "should not be emphasized to the point of distraction from the underlying concepts [because t]he issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities" (quoted authority omitted)), *overruled on other grounds by Schwartz v. City of Flint*, 426 Mich. 295, 395 N.W.2d 678, 679 (1986).

{32} The Court of Appeals aptly explained the differences between legislative and quasi-judicial actions as follows:

> [L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.

Commons II, 2006-NMCA-143, ¶ 36, 140 N.M. 751, 149 P.3d 67. Small-scale zone changes to which the *Miller* rule and Resolution 270-1980 apply are necessarily quasi-judicial, not legislative, in nature. As we noted earlier, the term "downzoning" is used to indicate a rezoning directed at a small number of properties, newly restricting the uses of those properties in ways that are not applicable to the surrounding area. Such restrictions are limited to

identifiable properties and are not general policy decisions that apply broadly. Further, because such changes must be justified pursuant to the *Miller* rule and Resolution 270-1980 (or a similar local policy), they require specific factual findings relating to the affected properties. *See Strawberry Hill 4 Wheelers v. Bd. of Comm'rs for Benton County*, 287 Or. 591, 601 P.2d 769, 775-76 (1979) (en banc) (noting that where pre-existing criteria guide the result, quasi-judicial proceedings are necessary to elicit the determinative facts). These qualities are the hallmarks of a quasi-judicial action.

{33} Characterization of a zoning action as quasi-judicial carries with it important procedural consequences. Thus, when a zoning authority initiates a proposal to downzone a particular property, the zoning authority must afford enhanced procedural protections to landowners whose properties are the subject of the zone change. *See* Ziegler § 40:22, at 40-49 (noting that characterization of a rezoning as quasi-judicial can result in the parties being entitled to greater procedural rights and enabling reviewing courts to conduct a closer scrutiny of the merits of the rezoning decision). Quasi-judicial zoning matters are not politics-as-usual as far as the municipal governing body is concerned. In such proceedings, the council does not sit as a mini-legislature, as it functions in most matters, but instead must act like a judicial body bound by "ethical standards comparable to those that govern a court in performing the same function." *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 119 N.M. 29, 40, 888 P.2d 475, 486 (Ct.App.1994).

{34} Therefore, in addition to the right to individual notice, interested parties in a quasi-judicial zoning

matter "are entitled to an opportunity to be heard, to an opportunity to present and rebut evidence, to a tribunal which is impartial in the matter—i.e., having had no pre-hearing or ex parte contacts concerning the question at issue—and to a record made and adequate findings executed." *Fasano*, 507 P.2d at 30. The burden is on the proponent of the zone change to establish that the change is justified. *See South of Sunnyside Neighborhood League v. Bd. of Comm'rs of Clackamas County*, 280 Or. 3, 569 P.2d 1063, 1071 (1977) (en banc). While the specific procedures employed "must adhere to fundamental principles of justice and procedural due process," they are not required to comport with the same evidentiary and procedural standards applicable to a court of law. *W. Bluff Neighborhood Ass'n*, 2002-NMCA-075, ¶ 46, 132 N.M. 433, 50 P.3d 182, *overruled on other grounds by Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, 133 N.M. 97, 61 P.3d 806. The issue is one of procedural fairness and predictability that is adaptable to local conditions and capabilities. The use of terms such as cross-examination, fair and impartial tribunal, and the like, need not be interpreted in the same sense as it might be in an attempt to reform the judicial process. *Ed Zaagman, Inc.*, 277 N.W.2d at 499 n. 33 (Levin, J., for affirmance and remand). In New Mexico, justification for small-scale zone changes is governed by the criteria set forth in *Miller* and in the municipality's own policies and procedures, which in this case are contained in Resolution 270-1980.

{35} Regardless of the justification, the decision-making body should provide "a clear statement of what, specifically, [it] believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision

is based," and a full explanation of why those facts lead it to the decision it makes. *South of Sunnyside Neighborhood League*, 569 P.2d at 1076. This is critical for facilitating meaningful judicial review of the action, "not for the purpose of substituting judicial judgment for administrative judgment but for the purpose of requiring the [zoning authority] to demonstrate that it has applied the criteria prescribed by . . . its own regulations and has not acted arbitrarily or on an ad hoc basis." *Id.; see Smith v. Bd. of County Comm'rs of Bernalillo County*, 2005-NMSC-012, ¶¶ 32-33, 137 N.M. 280, 110 P.3d 496 (reversing County's denial of a radio tower permit upon finding that, in denying the permit after having initially granted it, officials went against their original interpretation of the relevant ordinance and acted on an ad hoc basis).

The City's Arguments

{36} In a conscious decision, the City chose not to follow the procedural standards that attach to a quasi-judicial downzoning. Instead, on advice of counsel, the City adopted the 1995 Uptown Sector Plan amendments in the form of a legislative proceeding, thereby limiting evidence, preventing cross-examination, and making no effort to provide ACP with an impartial tribunal by limiting *ex parte* contacts on the part of the council members.[3] Apart

[3] As an example of the legislative-type lobbying that accompanied the passage of the 1995 Uptown Sector Plan amendments, Ron Nelson, President of the Uptown Association, called Councilor Vicki Perea after she had proposed amendments to the 1995 Uptown Sector Plan that would have eased the impact on ACP. Mr. Nelson encouraged Councilor Perea not to make amendments that would allow the Opus Plan to proceed and stated his belief that if she worked at it, Councilor Perea could get the four

from the broad and conclusory "whereas" points set forth in the ordinance adopting the 1995 Uptown Sector Plan, the City made no findings at all, let alone any specific findings of fact and explanation of how those facts justified the amendments under the *Miller* and Resolution 270-1980 criteria.

{37} However, the City argues, and the Court of Appeals agreed, that the 1995 Uptown Sector Plan Intense Core restrictions were valid because neither quasi-judicial procedures nor justification pursuant to *Miller* and Resolution 270-1980 were required in this case. With regard to the procedures used, the City contends that adoption of the 1995 Uptown Sector Plan was a legislative act, and therefore did not require any enhanced procedural protections for the affected landowners. As to the applicability of *Miller* and Resolution 270-1980, the City claims that those rules do not apply to rezonings accomplished by text amendments. This brings us to the crux of the case and to the decisive points where we disagree with the City and the Court of Appeals. We address each argument in turn.

Adoption of the 1995 Uptown Sector Plan Intense Core Restrictions Was Not a Legislative Act

{38} The Court of Appeals determined that adoption of the 1995 Uptown Sector Plan was a legislative act, reasoning that the City's decision was drawn to apply

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votes needed to pass the amendments favored by the Uptown Association. Councilor Perea then withdrew her proposed amendments. Such contacts and influence are common and appropriate in the normal legislative functioning of a city council. However, when a council sits in a quasi-judicial capacity, as it must to effect a downzoning, its members must be insulated from such contact.

in the same way, both currently and in the future, to all similarly situated properties, and was "premised on a desire to clarify and strengthen the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 39, 140 N.M. 751, 149 P.3d 67. In support of its holding, the Court of Appeals analogized this case to one of its earlier opinions. *See KOB*, 2005-NMCA-049, ¶¶ 37-39, 137 N.M. 388, 111 P.3d 708. In *KOB*, 2005-NMCA-049, ¶ 8, 137 N.M. 388, 111 P.3d 708, the City of Albuquerque adopted an ordinance that disallowed helipads in SU-2/O-1 zones, restricting helipads to SU-1 zones only, with exceptions for law enforcement and hospitals. KOB had obtained a permit and constructed a helipad for its television station under the formerly allowed uses for SU-2/O-1 zones. KOB argued that the ordinance downzoned its property, and thus the City was required to justify the new restrictions in accordance with the *Miller* rule. *Id.* ¶ 27. The Court of Appeals held that the City's adoption of the ordinance was legislative in nature because it established policy for the entire city, such that all SU-2/O-1 zones were subject to the same restrictions: no more helipads were to be allowed. *Id.* ¶ 23. Even though the ordinance had a practical effect on only two landowners by virtue of the fact that only two landowners within the affected zones had helipads, the restrictions were comprehensive in that they applied city-wide. Accordingly, the Court of Appeals upheld the new restrictions as a legislative act to which *Miller* did not apply.

{39} Relying on *KOB*, the Court of Appeals correctly observed that a downzoning does not necessarily occur, requiring quasi-judicial process, simply because only a small number of properties are impacted by the decision or "a particular parcel is in the mind of the zoning authority when it takes action."

Commons II, 2006-NMCA-143, ¶¶ 37-39, 140 N.M. 751, 149 P.3d 67. That statement is true as far as it goes, although the narrower the focus of the zoning action, the more likely it is that *Miller* will be implicated. By the same token, the fact that policy decisions are involved does not necessarily mean that a zoning action does not effect a downzoning. "Large-scale decisions of specific applicability frequently, if not inevitably, require of the decision-maker both the creation and the application of policy." *Neuberger v. City of Portland*, 288 Or. 155, 603 P.2d 771, 776 (1979). Nor is a rezoning, that applies to more than a single parcel, necessarily legislative. *See South of Sunnyside Neighborhood League*, 569 P.2d at 1071 n.5 (emphasizing that, by using the terms "single tract" and "single parcel," the court did not intend to adopt a test for determining when a given land-use decision was quasi-judicial or legislative). When a zoning action is *specifically designed* to affect a relatively small number of properties *and* does not apply to similarly situated properties in the surrounding area or city-wide, that action is quasi-judicial, not legislative.

{40} This case involves restrictions of a different nature than those addressed in *KOB*. The 1995 Uptown Sector Plan Intense Core restrictions, did not apply city-wide, or to the other five urban centers in the city, or even throughout the Uptown SU-3 area. Rather, the restrictions were confined to only a small portion of the Uptown sector, comprising about six percent of the total area and affecting only three landowners, by far the largest being ACP. Had the restrictions applied to all SU-3 zones in the city, or even had they applied throughout the Uptown SU-3 sector, then *KOB* might be of some precedential assistance. But, given that the restrictions were

limited to three parcels comprising only six percent of the Uptown sector, the Court of Appeals' reliance on *KOB* is misplaced.[4]

{41} Further, it appears that the 1995 Uptown Sector Plan amendments were not simply designed "to clarify and strengthen the [1981 Uptown Sector Plan]," as the Court of Appeals held. *Commons II*, 2006-NMCA-143, ¶ 39, 140 N.M. 751, 149 P.3d 67. The plain language of the 1981 Uptown Sector Plan, the City's own construction of the 1981 Uptown Sector Plan, and prior City approvals under that plan treated *all* of the SU-3 zone in Uptown as a "suburban commercial" center with shopping centers and restaurants that could be built "to virtually any intensity." Indeed, as stated earlier, an initial staff report on the second site plan submitted by Opus acknowledged that "the zoning on this site plan allows the proposed retail uses." Moreover, the amendments, by not placing limitations on retail uses for redevelopment or replacement of existing developments, were tailored to affect only ACP—the only property owner in the Uptown sector with a pending site plan—while exempting existing businesses.

{42} We are not persuaded by the City's assertion that the 1995 Uptown Sector Plan amendments merely made explicit what was already implicit in the 1981 Uptown Sector Plan. The very fact that the City postponed a decision on ACP's proposal while it rushed the sector plan amendments through a legislative process leads to a fair inference that the 1995

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[4] Because this case is demonstrably different from *KOB*, we need not inquire as to whether *KOB* correctly interprets and distinguishes *Miller* and *Davis*. We do note that this Court never had the opportunity to review that decision because KOB, the losing party on appeal, never sought a writ of certiorari.

Uptown Sector Plan was meant to *change* the former sector plan, not simply clarify it. It is difficult to see why, if the City could have denied ACP's permit under the 1981 Uptown Sector Plan, it did not do so at the outset. Instead, the City felt it necessary to stall consideration of ACP's permit and hastily amend the original sector plan.[5]

{43} Regardless of how the City tries to construe its actions, substantial evidence at trial showed that the 1995 Uptown Sector Plan Intense Core restrictions were directed specifically towards ACP and were not public policy matters of a general character. Those changes amounted to a downzoning of ACP's property and required justification based on the specific, fact-based criteria set forth in *Miller* and Resolution 270-1980. *W. Old Town*, 1996-NMCA-107, ¶ 16, 122 N.M. 495, 927 P.2d 529 ("The procedures for amending a sector plan are . . . the same as those for amending a zoning map."). Thus, the City's adoption of the 1995 Uptown Sector Plan was the type of zoning action that New Mexico courts, as well as courts from other jurisdictions, have traditionally

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[5] We observe that the City had ample opportunity prior to the submission of the Opus site plan to amend the Uptown Sector Plan. Indeed, the City had been in the process of reviewing the 1981 Uptown Sector Plan and developing draft revisions since 1989. The draft revisions submitted prior to ACP's submission of its site plan did not create a new Intense Core zone with heavier restrictions than the surrounding area, and did not restrict stand-alone retail projects, set mixed-use or density requirements, require structured parking, or prohibit phased construction to match demand. These initial draft revisions thus lend further support to the argument that the amendments proposed subsequent to ACP's site-plan, and ultimately passed by the City, were specifically designed to prevent ACP's proposed project.

viewed as quasi-judicial in nature primarily because of the disparate impact on only a small number of landowners. *See, e.g., W. Old Town*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529; *McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County*, 274 Kan. 303, 49 P.3d 522, 524 (2002) ("[W]here the focus of the zoning authority shifts from the entire city or county to one specific tract of land for which a zoning change is urged, the function of the zoning authority becomes more quasi-judicial in nature than legislative."); *South of Sunnyside Neighborhood League*, 569 P.2d at 1071 ("[T]he decision to amend the comprehensive plan as it applies to [a] single parcel of land is a quasi-judicial, rather than a legislative, decision."); *Fleming v. City of Tacoma*, 81 Wash.2d 292, 502 P.2d 327, 331 (1972) (en banc) ("[I]n amending a zoning code, or reclassifying land thereunder, [a municipal legislative body], in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change."), *overruled on other grounds by Raynes v. City of Leavenworth*, 118 Wash.2d 237, 821 P.2d 1204, 1208-09 (1992).

Rezoning By Text Amendment Versus Map Amendment

{44} The City presents an alternate argument for not following *Miller* and the Resolution 270-1980 criteria, premised on a purported distinction between zoning text amendments and zoning map amendments. Specifically, the City argues that "the adoption of the [1995 Uptown Sector Plan] *was not a rezoning* of ACP's property but was a text amendment to the zoning code, which strengthened the existing regulations in order to assure development of an urban center, as already required by the [1981

Uptown Sector Plan] and Comprehensive Plan." *Commons II*, 2006-NMCA-143, ¶ 40, 140 N.M. 751, 149 P.3d 67 (emphasis added). The Court of Appeals found the distinction between a zoning text amendment and a zoning map amendment persuasive. We are somewhat skeptical.

{45} In analyzing this argument, the Court of Appeals correctly observed that zoning map amendments "involve[ ] the zoning district reclassification of a particular tract of land by alteration of the official zoning map," while zoning text amendments "do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district." *Id.* ¶ 42. Thus, "[z]oning text amendments do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district." *Id.* Relying on two New Mexico Court of Appeals cases, the Court of Appeals found this distinction pivotal, reasoning that "the general term 'rezoning' seems to refer to a zone reclassification by map amendment," but not by text amendment. *Id.* ¶ 44. In other words, the known consequences of a zoning map amendment in terms of *Miller* and Resolution 270-1980 do not apply if the amendment is of the text but not the map. We now turn to an analysis of those two opinions.

{46} In *Mandel v. City of Santa Fe*, 119 N.M. 685, 686, 894 P.2d 1041, 1042 (Ct.App.1995), the City of Santa Fe amended the text of the zoning code to permit the Historic Design Review Board to limit the height of structures within certain historic districts to lesser heights than that allowed by the underlying zoning. Pursuant to this text amendment, the Review Board denied Mandel's proposed construction project

based on the existence of inappropriate second-story structures, and the City affirmed the denial. *Id.* at 687, 894 P.2d at 1043. Mandel claimed that the application of the height amendment to his property was an unlawful downzoning. *Id.* While the Court of Appeals "accept[ed] the notion that the allowable use of [Mandel's] property [had] been restricted," it nevertheless held that Mandel's property had not been downzoned. *Id.* at 688, 894 P.2d at 1044. The Court reasoned that "there was no rezoning that affected only Mandel's property or even Mandel's neighborhood. Rather, the City adopted a height restriction that could be generally applied to all properties in historic districts in the City." *Id.* at 689, 894 P.2d at 1045.

{47} As it did when deciding whether the City's action was legislative or quasi-judicial, the Court of Appeals again looked to *KOB* in its analysis of zoning text amendments. *See Commons II*, 2006-NMCA-143, ¶¶ 44-46, 140 N.M. 751, 149 P.3d 67. As noted previously, in *KOB*, the City of Albuquerque adopted an ordinance that disallowed helipads in SU-2/O-1 zones, restricting them to SU-1 zones with exceptions for law enforcement and hospitals. These changes were made pursuant to text amendments to the zoning code. The *KOB* court, relying in part on *Mandel*, held that because the ordinance established policy for the entire city such that all SU-2/O-1 zones were subject to the same restrictions, the City's actions did not amount to a downzoning requiring a showing of change or mistake.

{48} While it is true that both *KOB* and *Mandel* involved text amendments that were held not to have downzoned the complaining landowner's property, those decisions did not turn on the amendments

being to the text as opposed to the map. Rather, it was because the amendments were not site-specific that there was no downzoning to which the *Miller* rule would apply. As we have discussed, the City's amendments to the Uptown Sector Plan were very much site-specific, and it is this fact that fundamentally distinguishes *KOB* and *Mandel* from the present controversy.

{49} While the restrictions on ACP's property were accomplished by text amendment, that is where the similarity to *Mandel* and *KOB* ends. We agree instead with the district court that the 1995 Uptown Sector Plan Intense Core restrictions effectively created a new sub-zone within the Uptown Sector, regardless of whether such rezoning was accomplished by text amendment or map amendment. The only factor distinguishing this case from *Davis* is that the amendment in *Davis* was to the zoning map, not to the text. As we have indicated, that distinction is not dispositive; a bright-line rule that distinguishes between text amendments and map amendments such that the former can never constitute a rezoning would be a classic elevation of form over substance. We hold that the Intense Core restrictions implemented by the 1995 Uptown Sector Plan rezoned ACP's property to a more restrictive use, an action for which our courts have historically required justification by a showing of change in the community or mistake in the original zoning.

{50} For the same reasons, we reject the City's argument and the Court of Appeals' holding that Resolution 270-1980 does not apply in this case. While it is true that Resolution 270-1980 refers only to zone map changes and not text changes, the practical

effect of the 1995 Uptown Sector Plan was a map amendment, despite the labels used by the City.

{51} In this case, the City accomplished in practical effect through text amendment what would normally be done by map amendment. Indeed, in the 1995 Uptown Sector Plan, the Intense Core and the Outside of Intense Core are each labeled as a "zone." The 1995 Uptown Sector Plan Intense Core restrictions singled out a small section of the Uptown Sector and downzoned that area, requiring the City, as the proponent of the zone change, to justify that change in accordance with the criteria set forth in *Miller* and Resolution 270-1980. The City did not do so. "The City may not ignore or revise its stated policies and procedures for a single decision, no matter how well-intentioned the goal may be." *W. Old Town*, 1996-NMCA-107, ¶ 26, 122 N.M. 495, 927 P.2d 529.

{52} The City has failed to show that the adoption of 1995 Uptown Sector Plan amendments was legislative in nature, or that because the amendments were text amendments they did not rezone ACP's property. There is no legitimate justification for the City's failure to afford the proper procedural protections or comply with the standards set forth in *Miller* and Resolution 270-1980. We hold that the City's decision lacked procedural fairness and did not comport with due process of law.

The Second Administrative Appeal and ACP's § 1983 Damages Claim

{53} As described earlier, on remand from the first administrative appeal, the City denied ACP's site plan under the 1981 Uptown Sector Plan, and ACP appealed to the district court. On the second appeal, Judge Lang found that the City had not considered

the site plan as previously ordered by Judge Conway on the first appeal. Judge Lang then found that the site plan complied with the 1981 Uptown Sector Plan and ordered the City to approve the plan. The City appealed this ruling to the Court of Appeals, which held that the ruling was not a final order because the § 1983 damages claim was still pending in the district court. In the consolidated appeal below, the City again argued that the district court lacked the power to order the City to approve ACP's site plan. Because the Court of Appeals found the 1995 Uptown Sector Plan valid, contrary to the district court, the Court of Appeals did not have to reach the merits of the City's position that Judge Lang did not have the authority to order the City to approve the Opus site plan under the 1981 Uptown Sector Plan.

{54} We also do not reach that issue because it is now moot. The Archdiocese of Santa Fe sold ACP's site, and a new development was approved and built by another developer under later revisions to the 1995 Uptown Sector Plan which allowed the increased retail use and phased construction that was denied to ACP. Therefore, the only remaining issues involve ACP's § 1983 damages action and its takings claim.

{55} With regard to the § 1983 damages action, the City argued in the Court of Appeals that ACP had no constitutionally protected property interest, and therefore did not satisfy the threshold requirement for a § 1983 claim. ACP countered that because § 1983 property interests are defined by state and not federal law, New Mexico recognizes a property owner's right to be free from unjustified downzonings directed at his property, as indicated in *Miller* and *Davis*. *See also Smith*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110

P.3d 496 ("[Landowners] have a right to use their property as they see fit, within the law, unless restricted by regulations that are clear, fair, and apply equally to all.").[6]

{56} The City also argued that ACP, even if it had a protected property interest, was only entitled to nominal damages because it failed to show that if the City had implemented a fair process and followed the *Miller* and Resolution 270-1980 requirements, the amendments would not have been passed in any event.[7] ACP claimed that this issue had been argued and submitted to the jury, and that the jury's verdict demonstrated that ACP proved its entitlement to compensatory damages. These arguments were not addressed by the Court of Appeals based on its

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[6] Other jurisdictions recognize a protected property interest when a landowner has taken substantial steps in reliance on an existing zoning classification. *See, e.g., Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 897(6th Cir.1991) (landowner who had taken substantial steps in reliance on the existing zoning classification and representations by the city that his planned development was permitted by that zoning had property interest in the old zoning classification within which his development was permitted).

[7] We note that federal case law appears to allocate this burden differently. Thus, when a § 1983 plaintiff successfully proves a violation of procedural due process that results in a deprivation of a protected property interest, it is the *defendant's* (the City's) burden to prove that the same results would have been obtained, even if the plaintiff's due process rights had not been violated. *See, e.g., Gomes v. Wood*, 451 F.3d 1122, 1131 (10th Cir.2006) (stating that "when a procedural due process violation occurs and adverse action results, damages for injuries caused by the adverse action may not be recovered if the *defendant* can prove the action *would have* been taken even absent the violation" (citing *Carey v. Piphus*, 435 U.S. 247, 260, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (emphasis added))).

decision regarding the first administrative appeal. Because we reverse that decision, we remand the case to the Court of Appeals to consider the City's remaining issues argued on appeal in light of our analysis on the first administrative appeal and our discussion of *Miller* and Resolution 270-1980.

{57} With regard to the takings claim, the Court of Appeals observed that ACP's experts, who testified that the 1995 Uptown Sector Plan prevented any type of economically feasible development of the property, did not take into account the effect of the 1981 Uptown Sector Plan on the site plan. The Court of Appeals then stated that the effect of its opinion was "to uphold the City's denial of the site plan under the [1981 Uptown Sector Plan]." *Commons II*, 2006-NMCA-143, ¶ 87, 140 N.M. 751, 149 P.3d 67. Thus, the Court of Appeals reasoned that these expert opinions could not form the basis for the damages awarded by the jury on ACP's takings claim. Having so held, the Court of Appeals concluded that, "[s]ince ACP's proposed development could not have been built under the [1981 Uptown Sector Plan], no damages could have resulted from similar prohibitions under the [1995 Uptown Sector Plan], and ACP therefore failed in its burden to prove that the [1995 Uptown Sector Plan] effected an unconstitutional taking caused by the denial of all economically viable use of the property." *Id.*

{58} We disagree with the Court of Appeals that the site plan was not approvable under the 1981 Uptown Sector Plan. As we have observed, the very fact that the City rushed to enact the 1995 Uptown Sector Plan amendments before it considered ACP's proposed site plan—a plan which the planning department had already deemed to be in compliance with

the 1981 Uptown Sector Plan—undermines the City's position that it could have denied that proposed plan under the 1981 Uptown Sector Plan. Further, the discretion that the City possesses to deny site plans that are otherwise in compliance with existing zoning regulations is limited by the requirement that the City's decision pass muster under judicial review for administrative actions that are arbitrary and capricious or otherwise contrary to law. Existing zoning regulations and sector plans would mean little if the City had limitless discretion to deny proposed developments that were otherwise in compliance with those requirements. *See Smith*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496 ("Ad hoc, standardless regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner.").

{59} The record shows that the Opus site plan, though it needed some adjustments (adjustments that were in the process of being made at the time the City imposed the moratorium to consider the 1995 Uptown Sector Plan amendments), complied with the requirements of the 1981 Uptown Sector Plan and was no different from a number of projects that the City had previously allowed under that sector plan. *See Smith*, 2005-NMSC-012, ¶ 30, 137 N.M. 280, 110 P.3d 496 ("Courts generally show little deference to an agency's interpretation of its own statute when the interpretation is an unexplained reversal of a previous interpretation or consistent practice." (Quoted authority omitted.)); *High Ridge Hinkle Joint Venture*, 119 N.M. at 41, 888 P.2d at 487 (noting that the City Council "should not be permitted to achieve retroactivity through the back door by changing the meaning of an ordinance while leaving the language the same"). Because our Opinion has

now eliminated the basis for the Court of Appeals' reversal of ACP's takings claim, we remand the takings claim for the Court of Appeals to consider the other arguments raised by the City with respect to that claim.[8]

CONCLUSION

{60} We reverse the Court of Appeals on the first administrative appeal and affirm the district court on that matter. The case is remanded to the Court of Appeals to consider the City's remaining claims of error.

{61} *IT IS SO ORDERED.*

WE CONCUR: EDWARD L. CHÁVEZ, Chief Justice, PATRICIO M. SERNA and PETRA JIMENEZ MAES, Justices, and PAUL KENNEDY, J. Pro-Tem.

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[8] Of course, if the Court of Appeals finds for ACP on its § 1983 action and affirms the jury's award of damages on that claim, there will be no need to address the takings issue, as the takings verdict was an alternative to the due process verdict.

APPENDIX C

COURT OF APPEALS OF NEW MEXICO.

Nos. 24,026, 24,027, 24,042.

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner-Appellee,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent-Appellant.

April 26, 2006.
Revised Dec. 19, 2006.
Certiorari Granted, No. 29,791, Nov. 29, 2006.

OPINION

CASTILLO, *Judge.*

{1} On motion for rehearing, the opinion filed December 9, 2005, is withdrawn, and the following opinion is substituted in its place. Additionally, we append an order on rehearing, in which we address four issues argued in the motion for rehearing that were not developed in the original opinion, were not addressed, or need clarification. The motion is otherwise denied.

{2} This case is before us on the City Council of the City of Albuquerque's (City or City Council) appeal from a jury verdict and on writs of certiorari that we granted to review district court appeals of two administrative decisions, all relating to the City's 1995 amendment of the Uptown Sector Plan (95USP). The

district court determined that the amendment targeted the property of Albuquerque Commons Partnership (ACP) and resulted in a downzoning of that property. The district court ordered the City to consider ACP's development plan under the previous sector plan, the 1981 Uptown Sector Plan (81USP). Upon remand, the City considered the development plan under the 81USP and denied the development. ACP appealed that denial to the district court. The court determined that the City had not reviewed the development as ordered and concluded that the development had to be approved. In the meantime, ACP's claim for damages for violation of constitutional rights, resulting in a taking and violation of civil rights in connection with the 95USP, proceeded to a jury trial. The jury found for ACP and awarded damages of $8,349,095. We reverse the district court's initial conclusion regarding the 95USP. Because that conclusion formed the basis for the other two decisions, those decisions are likewise reversed.

I. BACKGROUND

{3} The record in these consolidated cases is quite extensive and involves several thousand pages of record. With this in mind, we will summarize many of the basic facts in chronological order and then incorporate specific facts into the discussion of the issues as necessary.

A. Development of the 81USP

{4} The City's Comprehensive Plan designated the Uptown Sector as one of several urban centers in the City. The Uptown Sector is located in the northeast section of Albuquerque, approximately 6.5 miles from the downtown area. It contains more than 2 million square feet of retail space, primarily in the two

regional malls, Winrock Center and Coronado Mall. In addition, the area contains 1.9 million square feet of office space, or 23 percent of the total office space in Albuquerque. The area provides the highest concentration of retail and office uses outside of downtown.

{5} An urban center is described as an area containing the highest densities and the tallest and most massive structures. It is intended to concentrate a wide range of community activities and intense land uses for greater efficiency, stability, image, and diversity and for a positive effect on the urban form, environmental quality, and the transportation network. Albuquerque Bernalillo County Comprehensive Plan (Comprehensive Plan) at 15 (1988, amended 1991). The goal of an urban center is "to create specially designed concentrations of high-density mixed land use and social/economic activities which reduce urban sprawl, auto travel needs, and service costs, and which enhance the urban experience." *Id.* at 69.

{6} In 1981, the City implemented the 81USP. It defined the area governed by the plan and set out the governing concepts for development in the area. Part of the plan dealt with traffic and transportation in the area, as well as specifically contemplating the construction of a loop road located in roughly the center of the sector. Excluding roads, the Uptown Sector covers approximately 460 acres. Under the 81USP, the majority of the Uptown Sector was zoned SU-3, the periphery was zoned SU-2, and the single-family homes along San Pedro Drive were zoned R-1 to protect the existing residential uses. These zoning classifications were not changed in the 95USP. *See* map of Uptown Sector Development Plan Parcel

Zoning (Appendix A) and map of Uptown Sector outlining inner core surrounded by Loop Road (Appendix B). SU-3 zoning provides suitable sites for high-intensity mixed uses-commercial, office, service, and residential. SU-2 provides suitable sites for a low-to medium-intensity mixture of office, service, institutional, and residential uses as a transition area between the core of the urban sector center and the surrounding low-density residential uses. The 81USP contained specific standards for site development plans in the SU-2 and SU-3 zones and required site development plan approval by the City Planner and the Environmental Planning Commission. The 81USP did not mandate development densities or limit the amount of retail use in a development and did not impose structured parking requirements. The 81USP did, however, repeatedly refer to pedestrian-friendly landscaping, open space, and building orientation within the center of the Uptown Sector, in accordance with the City's Comprehensive Plan. According to the Comprehensive Plan, Uptown is one of several urban centers; an urban center is defined as having a concentration of contiguous uses that include the highest densities and tallest and most massive buildings, providing a unique sense of place.

{7} From 1981 to 1988, there were minor amendments to the original 81USP, none of which affected the uses delineated in the original plan. Accordingly, we refer to the 1981 Uptown Sector Plan, as amended through 1988, as the 81USP. Review of the 81USP for content revision began in 1989; in March 1993, the revisions began in earnest. In March 1994, the first draft of the revisions to the 81USP was distributed to various agencies for comment.

B. First Two Site Development Plans

{8} ACP is a Texas general partnership whose principal partner is Albuquerque Uptown Partnership, another Texas general partnership. At all times material in this case, ACP was the leaseholder under a long-term ground lease with the Archdiocese of Santa Fe of the old St. Pius High School site, consisting of approximately 28 acres (28-acre parcel) located at the northeast corner of Louisiana Blvd. NE and Indian School Rd. NE, in the center of Albuquerque's Uptown Sector. The western 19.3 acres of the 28-acre parcel are located in the SU-3 zone, and the eastern 8.7 acres are located in the SU-2 zone. In 1987, ACP submitted a site development plan under the 81USP, consisting of a hotel, multistory office buildings, retail facilities, and a 7-acre arboretum. This proposed development included almost 1.3 million square feet in office space, 121,323 square feet dedicated to retail, and a 400-room hotel. The plan was approved by the City but was never built.

{9} The 28-acre parcel remained undeveloped until 1991, when ACP decided to sell its leasehold. ACP selected Opus Southwest Corporation (Opus) to assume development of the property. Opus proposed either to purchase or to lease the property if Opus could obtain approval of its site development plan. In June 1994, Opus submitted a site development plan for a 28-acre low-density "big box" retail shopping center. Because the site development plan included property in the SU-2 zone, Opus also requested a zone map amendment, as well as an amendment to the 81USP. The public strongly opposed the plan, and Opus withdrew it on August 31, 1994. The opposition was based on differing views of the type of development that was appropriate for the Uptown Sector:

the suburban nature of the Opus plan conflicted with the expectation of most of the surrounding property owners that development of undeveloped land in the center of the Uptown Sector would be urban in character. The opposition became public; the negative reaction of the surrounding property owners to the Opus site development plan was reported by at least one newspaper, and a number of letters criticizing the project were sent to the planning department, one of which was copied to the Mayor and councilors.

C. Final Site Development Plan and Development of the 95USP

{10} Soon after Opus withdrew its application, in mid-September 1994, the City passed Memorial M7-1994, requesting a comprehensive public review and revision to the 81USP. The City stated that it was desirous of fulfilling the vision of the plan, observed that the 81USP was in need of significant revision and strengthening, and requested that the planning department present its "plan-amendment recommendations and a record of the public review" of the 81USP to the City's Environmental Planning Commission (EPC) for consideration by the end of April 1995.

{11} On September 30, 1994, two weeks after passage of M7-1994, Opus submitted a second application, this time for development of a smaller, 17.9-acre low-density "big box" project. The project was to be located entirely in the SU-3 zone, so no amendments to the zoning map or sector plan were requested. *See* preliminary site plan (Appendix C).

{12} At this point, events follow two concurrent tracks: Opus focused its energy on obtaining site approval for the smaller development under an

unrevised 81USP, while the planning department was obtaining public input, arranging for studies to be conducted, scheduling public hearings, and working on revising the 81USP as per the terms of M7-1994. The following is a summary of these activities.

{13} A public workshop on Uptown Sector issues was presented for developers, landowners, businesses, and neighborhood leaders by the planning department in early November 1994; the department thus complied with the request for "comprehensive public review," as contained in M7-1994. The workshop was attended by about seventy-five people and covered numerous development issues, including mixed uses, evolving market demand and conditions, transportation, air-quality maintenance, and population trends, among others. The idea of identifying an intense urban core inside Loop Road was discussed, as was the use of a floor area ratio (FAR). "FAR" is defined as the leasable floor space divided by the site's square footage. Participants considered other related issues, such as balancing retail use, proposing internalized parking, encouraging evening activity, and improving transportation management. Information from this meeting was considered by the City in its revision of the 81USP.

{14} The Opus site plan had been originally set for a hearing in November before the City's EPC. Because Opus wanted to revise the site plan, based on agency and staff comments, Opus agreed to a deferral of that hearing to the January EPC meeting. Opus's revised site plan (Opus site plan) was referred to the EPC for review on January 1995. At the hearing on January 12, 1995, the EPC conducted a lengthy discussion regarding whether the Opus site

plan should be deferred, pending revision of the 81USP. The EPC ultimately decided to continue the hearing until the January 26, 1995, meeting. At this meeting, the EPC was informed that the City was considering a moratorium on development in the Uptown Sector, pending revision to the sector plan. Based on that information, the EPC deferred hearing Opus's development plan until February 9. The City Council was concerned that development in the Uptown Sector during the pending review and approval of amendments to the 81USP might be inconsistent or in conflict with the proposed revisions; therefore, on February 6, the City Council passed R-187. This resolution placed a four-month moratorium on all development within the Uptown Sector. On February 9, 1995, the EPC deferred hearing Opus's development plan until June, after the end of the moratorium. There was no appeal of the imposition of the moratorium.

{15} In February 1995, the planning department used a fast-track schedule with specific deadlines to prepare information necessary to evaluate proposed revisions to the 81USP. This information included a traffic impact analysis, an air quality and building intensity analysis, and a travel demand management scheme. By March 2, 1995, the revised plan was distributed for review. The focus of the revised plan was to quantify the policy set forth in the 81USP so that a true urban center would be sure to result. The amendments to which ACP objected were related to the additional regulations for an area inside the Loop Road, referred to as an intense urban core (intense core). Although the zoning designation remained SU-3, development in the intense core would require a minimum FAR of .7 and a maximum FAR of 1.5. A FAR of .7 requires that the leasable floor space be at

least 70 percent of the site's total square footage. A high FAR requires building up with very little parking space. Therefore, development would have to be predominantly office or other high-density use, with only specialty retail and commercial on the ground floor. All parking would be required to be in structures, except for a small number of spaces serving the ground-level establishments.

{16} The proposed revisions established a minimum FAR of .3 outside the intense core and a maximum of 1.0, thus allowing shopping centers and other retail uses. The amendments also required a Transportation Management Organization of Uptown, by which employers were to implement strategies to reduce single-occupant car trips to the area. Also included were recommendations regarding making the area more pedestrian friendly. The Albuquerque planning department made these recommendations on the bases that development in the area was becoming suburban and that the 81USP needed quantification in order for the City to maintain the policy objectives in urban areas of intense mixed use.

{17} The amendments were set for a series of public hearings before the EPC, the Land Use Planning and Zoning Committee (LUPZ), and the City Council. Through all of the public hearings, ACP and Opus were vocal and vehement in their objection to the amendments, which they argued effected a downzoning of their property. The public, representatives of neighborhood associations, and others provided testimony for and against all or part of the proposed revisions. Typically, the public viewed the proposed revisions to the 81USP as a way to "create a new sense of place, and protect [their] neighborhood[s] from suburban sprawl." One proponent was con-

cerned about the suburban sprawl to be created by the type of project proposed by Opus, which was described as "a [nineteen-]acre site, [fifteen] of [which] will be parking." Generally, the neighborhood associations urged a follow-through with the vision of Uptown as a true urban center, and they opined that this would be the long-term solution to transportation and air quality concerns.

{18} The first public hearing on the proposed revisions was held on April 13, 1995, before the EPC. After the staff presentation, the EPC heard comments from proponents and opponents of the proposal. On May 10, 1995, the LUPZ met and took testimony both from the planning department and the public. On May 24, 1995, a joint meeting of the EPC and the LUPZ was held. At that time, traffic, transportation, and air quality studies were reported. Issues that had been raised by the public at the April EPC hearing and the May 10 LUPZ meeting were addressed by a supplemental staff report presented at the joint meeting.

{19} At the conclusion of the joint meeting, the EPC continued with its meeting and voted 5-3 to recommend against the amendments. In the notification of its decision to LUPZ, the EPC found that the air pollution problem in the Uptown area would not be significantly affected by the land uses advocated, especially without a citywide traffic management plan. It also pointed out that there was testimony from developers suggesting that the FAR minimums and maximums would make development uneconomical, as evidenced by development in the downtown urban sector with similar FARs. Finally, the EPC found that the proposed amendment to the 81USP did not comply with Resolution 270-1980,

which sets forth certain requirements that must be met in cases of zone changes. The text of this resolution is contained in paragraph 64 herein. The EPC agreed that the sector plan needed revising but stated that the revisions proposed were unsatisfactory.

{20} The LUPZ met on May 30, 1995, and continued discussion on the amendments to the plan. The testimony at this hearing specifically addressed the findings on which the EPC based its recommendation not to adopt the revised plan. As to air pollution, a planner with the Environmental Health Division addressed the differences between the Parson's air quality study done for the City and the analysis of the data by JHK & Associates (JHK) that was performed for ACP. In addressing JHK's position that there was no meaningful difference in air quality between high-density office use and retail, the planner explained that the JHK conclusion was based on selected data only and that when all the data are used, mixed uses, together with any amount of transportation management strategies, will result in fewer exceedances of the carbon monoxide standards.

{21} Also at this meeting, there was testimony from three people with experience in the real estate or financial field, who provided information regarding office vacancy rates in Uptown and who were of the opinion that the vacant land in the intense core could develop under the 95USP. One of the witnesses represented an owner of vacant land in the intense core.

{22} As to the need to follow the requirements of Resolution 270-1980, the city attorney explained that in his opinion, the changes to the sector plan were not map changes and that the resolution therefore did not apply. At the close of the testimony, one of the

councilors observed that the problems inherent in the findings of the EPC had been "significantly addressed" during the meeting of the LUPZ. At the conclusion of the LUPZ hearing, the committee voted to send the revised sector plan on to the full City Council.

{23} The City Council met on June 5, 1995, to hear the matter. At that time, a number of amendments were proposed that had apparently been the result of negotiation among councilors, their constituents in the neighborhoods surrounding the Uptown Sector, and Uptown Sector businesses. Because the public had not been given the amendments prior to the meeting and was unprepared to discuss the amendments, the City Council deferred final hearing on the matter for about two weeks.

{24} On June 19, 1995, after adoption of several amendments to the revised sector plan and extensive argument both for and against the plan, the City Council voted 7-0 in favor of the revisions to the 81USP. In its resolution adopting the 95USP (Resolution 94-1995), the City Council made a number of findings, including that the plan's policy objectives needed to be quantitatively defined. It found that Uptown, as an urban center, affects the entire City and that Uptown's land use, transportation, and development have an impact on the safety and air quality of the entire metropolitan area.

{25} On July 6, 1995, the EPC voted to defer indefinitely Opus's site plan because it did not comply with the 95USP. Thereafter, ACP filed a petition in district court for review of the approval and adoption of the 95USP. ACP's complaint in district court sought review of the adoption of the 95USP and review of the City's refusal to hear the Opus site plan under

the 81USP. That complaint was later amended to include claims for damages for violation of constitutional rights, resulting in a taking of property and violation of civil rights. The district court conducted the administrative review of the adoption of the 95USP first and, for the reasons detailed in paragraph 32 herein, concluded that the intense core provisions of the 95USP could not be applied to the Opus site plan. The district court therefore remanded the matter to the City to consider the Opus site plan under the 81USP, the previous sector plan.

{26} The EPC heard the plan in November 1999 and denied it on the basis that it did not create the type of urban place that the master plan had intended. ACP appealed to the City Council, which agreed with the EPC and voted to deny the development. An appeal to district court resulted in a determination that the site plan did in fact comply with the 81USP, and the district court ordered that the plan be approved.

{27} The City filed a petition for writ of certiorari from that administrative decision. We denied the writ, based on our determination that the entire case had not yet been disposed of and that the appeal was premature. *Albuquerque Commons P'ship v. City of Albuquerque*, 2003-NMCA-022, ¶ 1, 133 N.M. 226, 62 P.3d 317.

{28} In February 2003, a jury trial was conducted on ACP's claims of constitutional taking and violation of due process. The claims were based on the City's adoption of the 95USP and its application to ACP's property. The jury was instructed that the law of the case was that ACP's property had been downzoned and that ACP was entitled to a quasi-judicial hearing before the property was downzoned. Finding that

ACP's due process rights were violated, the jury awarded damages.

{29} After judgment on the verdict, the City filed two petitions for writ of certiorari with regard to the two administrative decisions on the adoption and application of the 95USP. The City also filed a notice of appeal from the jury verdict. All three cases are consolidated.

II. DISCUSSION

{30} We begin with the review of the district court's order as it relates to the City's enactment of the 95USP.

A. Standard of Review for Administrative Review

{31} This Court reviews a district court's decision in an administrative appeal under an administrative standard of review. *Gallup Westside Dev., LLC v. City of Gallup*, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78. In so doing, "[w]e 'conduct the same review of an administrative order as the district court sitting in its appellate capacity, while at the same time determining whether the district court erred in the first appeal.'" *Id.* (quoting *Rio Grande Chapter of the Sierra Club v. N.M. Mining Comm'n*, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806). "The district court may reverse an administrative decision only if it determines that the administrative entity, here the City, acted fraudulently, arbitrarily, or capriciously; if the decision was not supported by substantial evidence in the whole record; or if the City did not act in accordance with the law." *Gallup Westside Dev., LLC*, 2004-NMCA-010, ¶ 10, 135 N.M. 30, 84 P.3d 78. A reviewing court may not substitute its judgment for that of the City. *Id.* ¶ 11. In making our determination, we independently review only the record before

the district court regarding the City Council's adoption of the 95USP.

B. Decision of the District Court Regarding the 95USP

{32} On June 17, 1998, the district court prepared a letter decision with a detailed explanation of the decision on the various issues presented, including the adoption of the 95USP. The court entered its order (Order) on July 23, 1999, together with findings of fact and conclusions of law relating to the Order. Essentially, the district court determined that the 95USP created a new zone—the intense core—and that the creation of this new zone amounted to a downzoning of ACP's property. The district court further concluded that the downzoning was contrary to the *Miller* rule. *Miller v. City of Albuquerque*, 89 N.M. 503, 505, 554 P.2d 665, 667 (1976) (requiring evidence of a change or a mistake before downzoning property). The court also determined that the City had violated Resolution 270-1980 and that the zoning action was a quasi-judicial act. Based on these conclusions, the district court prohibited the City from applying the intense core provisions of the 95USP to the Opus site plan application.

{33} Below, we discuss (1) quasi-judicial versus legislative action, (2) text amendments and rezoning, (3) uniformity, (4) Resolution 270-1980, (5) downzoning, and (6) the "change or mistake" rule. Before we address these issues, however, it is important to examine the basic way the district court viewed this case and why that approach was inconsistent with the applicable standard of review, thereby leading to the errors we hold are present.

{34} In the decision letter, the district court pointed out that there are two completely different views of this case. One "is the story of a very careful, thorough, inclusive process of developing creative legislation to amend the Sector Development Plan of a critical section of the city." The other involves the placing of the burden of fulfilling a vision of Uptown on a single property owner. The district court concluded that this case was the second situation. Our review of the record shows otherwise.

{35} Under whole record review, the district court may not substitute its judgment for that of the agency—the City in this case—and must evaluate whether the record supports the result reached, not whether a different result could have been reached. *See, e.g., Zamora v. Vill. of Ruidoso Downs*, 120 N.M. 778, 784, 907 P.2d 182, 188 (1995); *Hernandez v. Mead Foods, Inc.*, 104 N.M. 67, 71, 716 P.2d 645, 649 (Ct.App.1986), *limited on other grounds, Graham v. Presbyterian Hosp. Ctr.*, 104 N.M. 490, 491-92, 723 P.2d 259, 260-61 (Ct.App.1986). If there is evidence in the record to support the result reached by the agency, the district court is to affirm, even if it would have found the facts differently or reached a different result had the court been the decision maker in the first instance. *State v. Seal*, 75 N.M. 608, 609-10, 409 P.2d 128, 129 (1965). In this case, the district court recognized the evidence supporting the conclusion that the City carefully considered the amendments to the sector plan in a critical area of the City; however, it appears the district court directed its attention to the effect of the City's decision on ACP's property and, in doing so, failed to evaluate the evidence supporting the City's decision. Because the record contains evidence supporting the decision of the City, this, among other reasons, forms the basis for our

conclusion that the City's action was legislative in nature and that no downzoning occurred. As we consider the parties' arguments, we will detail, as necessary, the evidence presented in support of the City's action and evaluate that evidence in light of the legal issues presented.

C. Issues

1. Quasi-judicial Versus Legislative Action

{36} The nature of the City's action is pivotal in this case. Accordingly, we begin our discussion of the issues by evaluating whether the adoption of the 95USP was a quasi-judicial or legislative action. The district court found and concluded that the most burdensome of the new requirements in the 95USP fell on ACP and on two other parcels; that the creation of an intense core constituted a downzoning of ACP's property; that the City treated the amendment as a legislative action and not a zone change of a small area, requiring quasi-judicial procedures to be followed; and that ACP was entitled to, and did not receive, quasi-judicial review of its objections to the downzoning. We have explained the basic differences between legislative action and quasi-judicial action in *KOB-TV, L.L.C. v. City of Albuquerque*, 2005-NMCA-049, ¶¶ 19-20, 137 N.M. 388, 111 P.3d 708. In summary, legislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in

question. *Id.* Generally, legislative actions result in the formulation of a general rule of policy, and quasi-judicial actions result in the application of a general rule of policy. Consequently, application of a general rule to a particular piece of property, as occurred in the rezoning of a single property in *West Old Town Neighborhood Ass'n v. City of Albuquerque*, 1996-NMCA-107, ¶ 11, 122 N.M. 495, 927 P.2d 529, *superceded by statute on other grounds, as stated in C.F.T. Development, LLC v. Board of County Commissioners*, 2001-NMCA-069, ¶ 14, 130 N.M. 775, 32 P.3d 784, is quasi-judicial. Often, quasi-judicial actions begin with the filing of an application by an individual property owner, who requests some type of relief that is authorized when certain facts are present. Examples include matters like approval of the property owner's proposal to build a gas station in a parking lot, applications for conditional use permits, and petitions for variances. *See, e.g., Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 18, 137 N.M. 152, 108 P.3d 558 (holding that the city's decision to approve a gasoline station was quasi-judicial in nature); *State ex rel. Battershell v. City of Albuquerque*, 108 N.M. 658, 662, 777 P.2d 386, 390 (Ct.App.1989) (deciding that hearings before a zoning hearing examiner and the Environmental Planning Commission regarding an application for conditional use permits were quasi-judicial); *Duke City Lumber Co. v. N.M. Envtl. Improvement Bd.*, 95 N.M. 401, 402, 622 P.2d 709, 710 (Ct.App.1980) (determining that a public hearing to consider a petition for a variance in air-quality regulation was quasi-judicial).

{37} Here, the district court found that the vacant property remaining to be developed in the intense core was controlled by only three parties. However, the fact that the vacant property remaining to be

developed here belongs to a limited number of parties does not mean that the zoning action was necessarily quasi-judicial in nature. "'[T]he central focus, in our view, should be on the nature of the governmental decision and the process by which that decision is reached.'" *Jafay v. Bd. of County Comm'rs*, 848 P.2d 892, 898 (Colo.1993) (en banc) (quoting *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 626 (Colo.1988) (emphasis omitted)). *Jafay* analyzed the zoning action to see if it applied to only a single site or whether it established an areawide policy regarding future urban growth. 848 P.2d at 898. If the zoning decision has general application and was drawn to apply in the same way currently and in the future to all similarly situated properties, it is legislative. *See Rockville Fuel & Feed Co. v. City of Gaithersburg*, 266 Md. 117, 291 A.2d 672, 680 (1972). As we stated in *KOB-TV*, "a legislative decision may appear adjudicatory when parties focus on the effect of the particular decision on individual rights. However, policy decisions generally begin with the consideration and balancing of individual rights." 2005-NMCA-049, ¶ 22, 137 N.M. 388, 111 P.3d 708 (internal quotation marks and citation omitted).

{38} First, we observe, as did the district court, that the burden of the restrictions does not fall solely on ACP. It is only that ACP's property is vacant and yet to be developed. Two other vacant properties are also subject to the restrictions, and there are other properties within the intense core that, in large part, already comply with the density and parking restrictions. For example, the Park Square block overall has a FAR of about 1.15 with a mixture of office, specialty retail, and commercial. Moreover, contrary to ACP's argument, any redevelopment that occurs within the core must abide by these

restrictions. ACP is not prevented from developing its property. It must simply now abide by the density and parking restrictions of the intense core. Zoning as "governmental regulation of the uses of land and buildings" always affects a property owner's ability to use his property as he sees fit. *Miller*, 89 N.M. at 505, 554 P.2d at 667 (internal quotation marks and citation omitted). The fact that he cannot use it as he wants is simply the price of living in a modern community. *Id.* (recognizing that incidental economic loss resulting from zoning restrictions is "merely the price of living in a modern enlightened and progressive community" (internal quotation marks and citation omitted)).

{39} Second, the fact that a particular party's proposed development or a particular parcel is in the mind of the zoning authority when it takes action does not change the nature of the decision. *KOB-TV*, 2005-NMCA-049, ¶ 24, 137 N.M. 388, 111 P.3d 708. ACP argues that its property was targeted in the revisions to the sector plan. We agree that ACP's proposed big-box development did influence the timing of the amendments to the sector plan. This is not determinative. As we stated in *KOB-TV*, "the fact that a zoning authority considers a particular party's proposed development or a particular parcel when it takes actions does not change the nature of the decision." *Id.* (citing *Atlanta Bio-Med, Inc. v. DeKalb County*, 261 Ga. 594, 408 S.E.2d 100, 102 (1991)). Although there was evidence that community concerns may have influenced the City's actions, the record is clear that legitimate concerns about the development of the Uptown Sector formed a basis for the revision. We cannot say, and the district court did not hold, that the City's decision in this case to adopt the 95USP was based solely on public outcry or a

desire to prevent ACP from developing its property. Rather, there is much in the record supporting the City's position that the decision was premised on a desire to clarify and strengthen the 81USP. Indeed, the very terms of the adopting resolution outline the various purposes for which it was enacted. These purposes include strengthening the sector plan, quantitatively defining the Comprehensive Plan's policy objectives, and maintaining the area as an urban center. Revisions to the 81USP were made in order to achieve these purposes. We reverse the district court and hold that the adoption of the 95USP was a legislative act.

2. Text Amendment and Rezoning

{40} Another question here is the characterization of the City's zoning action. In concluding that the creation of the intense urban core amounted to an illegal downzoning, the district court found that the 95USP created a "new zone." The City maintains, and has from the beginning, that the adoption of the 95USP was not a rezoning of ACP's property but was a text amendment to the zoning code, which strengthened the existing regulations in order to assure development of an urban center, as already required by the 81USP and Comprehensive Plan. ACP disagrees. It points to the differences in allowed uses between the intense core and the area outside the intense core, both of which are in the SU-3 zone, and argues that these changes are so drastic that they essentially effect a rezoning from unrestricted retail to predominately office. ACP compares the type of projects approved under the 81USP with those that would be allowed under the 95USP and concludes that the 95USP does not strengthen the existing regulations but rather severely restricts formerly

approved uses. Last, ACP contends that the district court correctly considered the creation of the intense core zone a fundamental change in the uses of ACP's land and that this constitutes a zone change, regardless of the City's characterization of the amendment.

{41} We address ACP's "fundamental change" argument first. In *Nesbit v. City of Albuquerque*, 91 N.M. 455, 458, 575 P.2d 1340, 1343 (1977), we held that a proposed amendment to a development plan increasing units from 83 to 287 constituted a fundamental change in a zoning restriction and thus required notice and public hearing. Zoning law regarding "fundamental change" relates to the necessity for notice and hearing on the items delineated in the notice. *Id.* There is no contention here that the notice was inadequate. The law regarding "fundamental change" does not set forth the differences between a text amendment and rezoning. For this distinction, we look elsewhere.

{42} We now turn to the characterization of the City's action in adopting the 95USP. We observe that the parties and the district court used the terms "rezoning" and "zone change" to mean the creation of a new zoning district. A zoning ordinance generally consists of two parts: (1) the text setting forth procedures and regulations relating to the various districts and (2) the map showing where such districts are located. 1 Norman Williams, Jr., and John M. Taylor, *American Land Planning Law* § 17:4, at 464 (rev. ed.2003). After a zoning ordinance is enacted, changes are made by zoning amendments. Ziegler describes all zoning amendments as "rezonings" and divides them into three main categories: map amendments, text amendments, and amendments to

procedures. 3 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* (*Rathkopf's*) §§ 38:2 to 38:4, at 38-3 to -4 (2005). The most common type of rezoning is a zoning map change that involves the zoning district reclassification of a particular tract of land by alteration of the official zoning map. 3 *Rathkopf's, supra* § 38:2, at 38-3. Then there is the change to a zoning text or code that specifies the allowed or permitted uses within a particular existing zoning district classification. 3 *Rathkopf's, supra* § 38:3, at 38-3 to -4. Zoning text amendments do not affect the zoning district classification, but rather change the allowed or permitted uses within a particular zoning district. *Id.* A zoning text amendment is exemplified by an ordinance that changes the use restrictions applicable to a particular zone. 6 Patrick J. Rohan, *Zoning and Land Use Controls* § 39.02[1], at 39-2 (1992). The last type of rezoning, which is not at issue in this case, involves changes to specific procedural requirements under a zoning ordinance. 3 *Rathkopf's, supra* § 38:4, at 38-4.

{43} Based on the above, the critical question is not whether there was a "rezoning," but rather whether the City's amendment to its zoning code was accomplished by map amendment or by text amendment.

{44} New Mexico law recognizes that a text amendment is different from a zone reclassification; the general term "rezoning" seems to refer to a zone reclassification by map amendment, much as Ziegler does later in his treatise. 3 *Rathkopf's, supra* § 39:2, at 39-2 to -3. We base this on two cases: *KOB-TV*, 2005-NMCA-049, ¶¶ 8, 27, 137 N.M. 388, 111 P.3d 708, and *Mandel v. City of Santa Fe*, 119 N.M. 685, 894 P.2d 1041 (Ct.App.1995). In *KOB-TV*, the television station (KOB) had been legally operating a

helicopter from its studios, located on property zoned SU-2/O-1. 2005-NMCA-049, ¶¶ 2, 3, 137 N.M. 388, 111 P.3d 708. In 1997, the City issued to KOB a building permit for construction of a helipad on the property, after which KOB began remodeling its facility to include the helipad and purchased a $1 million helicopter. *Id.* ¶ 3. Thereafter, the City adopted an amendment to its zoning code restricting the location and operation of all helicopters, except medical and law enforcement helicopters, to SU-1 zones. *Id.* ¶ 23. Based on the amendment, the City revoked the permit allowing KOB's helipad use. *Id.* ¶ 9. We characterized the ordinance as a text amendment. *Id.* ¶ 8. There was no change in the zoning of KOB's property, but the zoning amendment affected the uses allowed on the property by eliminating helipad use. *Id.* ¶ 27. Similarly to the amendment in *KOB-TV*, the revisions to the 81USP did not change the zoning classification of ACP's property but arguably affected the uses to which ACP could put the property.

{45} In *Mandel*, the City of Santa Fe amended the city zoning code to permit the Historic Design Review Board to impose height restrictions in historic districts (Height Amendment). 119 N.M. at 686, 894 P.2d at 1042. The Height Amendment went into effect while Mandel's development was being considered by city authorities, and his proposal was ultimately denied on the basis of inappropriate second-story structures, as prohibited by the Height Amendment. *Id.* at 686-87, 894 P.2d at 1042-43. One of Mandel's arguments objecting to the imposition of the height restrictions was that if the underlying zoning permits a certain height, any lessening of that height is in effect a rezone. *Id.* at 688, 894 P.2d at 1044. We disagreed. *Id.* We noted that the zoning of

Mandel's property remained the same but that its location in a historic district made the property subject to more restrictive requirements. *Id.* Imposition of height restrictions "does not mean the property has been rezoned." *Id.*

{46} ACP argues that passage of the 95USP was tantamount to enacting an amendment to the zoning map because the 95USP effectively created two zones: the intense core and outside the intense core. We are not persuaded. As in *KOB-TV* and *Mandel*, the zoning in the Uptown Sector remains SU-3, which allows for the high-intensity mixture of commercial, residential, and retail uses encouraged in an urban center. Any development in the SU-3 zone requires approval of a site development plan. Although the zoning remained the same, the 95USP denoted different uses, building densities, and parking limitations in the intense core and outside the intense core. We view the different uses, building densities, and parking restrictions in the intense core of the Uptown Sector no differently than we viewed the historic overlay in *Mandel*.

{47} ACP also contends that the City's argument that the 95USP was merely a "text amendment" is inconsistent with *West Old Town Neighborhood Ass'n*. We disagree. *West Old Town Neighborhood Ass'n* dealt with a zoning classification in a sector plan covering property in the greater Old Town area, both inside and outside the city boundaries. 1996-NMCA-107, ¶ 4, 122 N.M. 495, 927 P.2d 529. Rejecting the City's argument that the zoning classification in the sector plan was merely advisory as to land outside the city limits, we held that because the sector plan established RA-1 zoning for "the area it covered, the change to SU-1 was rezoning." *Id.* ¶ 18. Unlike the

change to the underlying zoning classification in the Old Town sector plan, the 95USP does not change any of the zoning classifications established in the 81USP. Consequently, ACP's argument fails.

{48} The 95USP amended the City's zoning code. While we agree that this was a rezoning, *see* 3 *Rathkopf's, supra* § 38:3, at 38-3 to -4, the rezoning was accomplished by text amendment, not map amendment. This conclusion relates to our evaluation of the following issues: Resolution 270-1980, downzoning, and application of the "change or mistake" rule.

3. Uniformity

{49} ACP contends that the City attempted to avoid the rezoning rules by creating a new SU-3 intense core zone in the guise of revising the 81USP. ACP argues that the regulations of the intense core were not applicable citywide or even to all SU-3 designated property in the 81USP and thus violated the requirement of uniformity, as specified by NMSA 1978, § 3-21-1(B)(2) (1995). Section 3-21-1(B)(2) allows a municipal zoning authority to "regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. All such regulations shall be uniform for each class or kind of buildings within each district, but regulation in one district may differ from regulation in another district." So the question becomes whether all restrictions within one zone must be uniform.

a. History of Zoning

{50} To answer this question we look to the history of zoning as it applies to sector plans. Zoning is defined as "governmental regulation of the uses of land and buildings according to districts or zones."

Miller, 89 N.M. at 505, 554 P.2d at 667 (internal quotation marks and citation omitted). "When used to promote the public interest, it is justified and has been upheld as a legitimate exercise of the police power." *Id.* (citing *Euclid v. Ambler Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926)). From the *Euclid* case comes the term "Euclidean" zoning which "describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules that would be largely self-administering." 1 Edward H. Ziegler, Jr., *Rathkopf's The Law of Zoning and Planning* § 1:5, at 1-21 (2005). Generally, by means of Euclidean zoning, a municipality divides an area geographically into particular use districts and specifies certain uses for each district. Each district, or zone, is then dedicated to a particular purpose—residential, commercial, or industrial—and each zone will appear on the municipality's official zoning map. *Id.* § 1:3, at 1-18. "Euclidean zoning . . . exists more in form than in fact in many communities today. The modern trend clearly is towards greater flexibility and discretionary review of proposed individual uses." *Id.* § 1:5, at 1-24 (footnote omitted). This flexibility is apparent in the Comprehensive Plan and the 81USP, which contemplated an urban center, zoned the bulk of the property in Uptown as SU-3, and required site development approval to accomplish the goals of the plans. As observed in *Rathkopf's*,

> [o]ver the years, . . . many communities . . . have come to recognize the potential benefits of providing for mixed-use development in selected areas. . . . These districts usually provide a set of development, performance and design standards that are specifically tailored to a particular area in order to deal with problems of compatibility

> and to implement a community's predominant use and density plan for that area. Mixed-use districts often are utilized near downtown business areas [and] in uptown business centers....

Id. § 11:12, at 11-40 to -41 (footnote omitted).

{51} As to the uniformity requirement in these mixed-use districts, "[s]o long as zoning classifications and restrictions do not arbitrarily discriminate between owners or lands similarly situated, the 'uniformity' requirement in zoning is unlikely to be held to be violated." *Id.* § 11:16, at 11-53. "Generally the uniformity requirement has not significantly limited the modern trend toward more intensive and site [-] specific regulation of land development through special zoning districts and discretionary development review." *Id.* at 11-53 to -54.

b. Uniformity Concept

{52} The uniformity concept is discussed at length in *Giger v. City of Omaha*, 232 Neb. 676, 442 N.W.2d 182, 194-95 (1989), where the court concluded that the uniformity requirement does not prohibit different classifications within a district, so long as they are reasonable and based on the public policy to be served. The court relied on *Charter Township of Oshtemo v. Central Advertising Co.*, 125 Mich.App. 538, 336 N.W.2d 823, 826 (1983) (explaining that the township rural zoning act, which provides that zoning ordinance provisions be uniform for each class of land, buildings, dwellings, and structures throughout the district, is subject to the "reasonableness" exception, allowing reasonable restrictions based upon different conditions within the zone), and *Quinton v. Edison Park Development Corp.*, 59 N.J. 571, 285 A.2d 5, 9-10 (1971) (recognizing that the statute that requires zoning regulations be uniform for each class

or kind of buildings or other structures, as well as for uses of land throughout each district, does not prohibit classifications within a district, as long as they are reasonable). In *Charter Township of Oshtemo*, the Michigan court of appeals held that allowing billboards only in those parts of "C" zoned areas within 150 feet of an interstate highway and its business route was reasonable, based on the type of sign and driving patterns. 336 N.W.2d at 826. In *Quinton*, the New Jersey supreme court upheld a 100-foot buffer strip between adjacent business and residential use when the business is located on a 10- or more acre tract, so as to protect adjacent residential areas from noises, lights, and other disturbances that accompany large commercial developments, even when the residential area to be protected is in an adjoining municipality. 285 A.2d at 6, 10. In both cases, the reviewing courts evaluated the restriction in light of its purpose and recognized a reasonableness exception. We see no reason why such an exception should not apply here. *See* 1 Kenneth H. Young, *Anderson's American Law of Zoning* § 5.25, at 454-55 (4th ed.1996). The uniformity requirement does not prohibit a different classification within a district, as long as it is reasonable and based upon the public policy to be served. *See also Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483, 501-02 (1977) (finding no violation of the uniformity provision in requiring a certain portion of the FAR to be designated for parking in one business district but not in another when both business districts are located in the same zoning district); *Rumson Estates, Inc. v. Mayor of Fair Haven*, 177 N.J. 338, 828 A.2d 317, 329-30 (2003) (deciding that the uniformity requirement is not absolute and that as long as similarly situated property is treated the same, dif-

ferent conditions in same zoning district, such as special requirements for single-family dwellings located on steep slopes, would permit different regulations).

{53} ACP relies on *Smith v. Board of County Commissioners*, 2005-NMSC-012, ¶ 33, 137 N.M. 280, 110 P.3d 496, for the propositions that regulations restricting the use of land must be clear and fair and must apply equally to all and that "standard-less regulation that depends on no more than a zoning official's discretion would seriously erode basic freedoms that inure to every property owner." ACP argues that the restrictions imposed for the property located in the intense core violated this basic tenet and were unreasonable and that they therefore violated the uniformity requirement.

{54} We fully agree with the proposition in *Smith*, but we disagree with ACP's assertion that the 95USP violates the proposition. As we have stated before, the 95USP quantified the direction already provided in the 81USP. The 81USP specifically states that the SU-3 zone in the Uptown Sector "provides suitable sites for a high intensity mixture of commercial, office, service, institutional, and residential uses." The permissive uses set out in the plan were all "subject to site development plan approval." Specifying FARs, structures for parking, and mixed use in the center of the Uptown Sector achieves the basic premise set out in the 81USP. Just because a use is permitted does not mean that a project with that use will be approved. *See W. Bluff Neighborhood Ass'n v. City of Albuquerque*, 2002-NMCA-075, ¶ 3, 132 N.M. 433, 50 P.3d 182 (explaining that the original site plan for a 65-acre development approved by the EPC was ultimately rejected by the city council), *overruled*

in part on other grounds, Rio Grande, 2003-NMSC-005, ¶ 16, 133 N.M. 97, 61 P.3d 806. Numerous factors must be considered in order to have a site plan approved. *W. Bluff*, 2002-NMCA-075, ¶ 33, 132 N.M. 433, 50 P.3d 182 ("In the process of considering a proposed site plan, a municipality must apply its expertise in weighing and balancing many factors and policy concerns, a practice which necessitates an exercise of discretion."). The City exercised the required discretion in evaluating ACP's site plan, and the plan was properly rejected under both the 81USP and the 95USP.

c. Rationales

{55} In this case, there are at least two rationales for more intense building requirements in the inner core: (1) to encourage intense urban uses in the Uptown Center, as envisioned by the 81USP and the Comprehensive Plan, and (2) to improve air quality. In Resolution 94-1995, the City found that the Uptown area is designated by the Comprehensive Plan as one of five urban centers and one of only three that are zoned SU-3, as permitted by the Code. The City also found that the revisions to the 81USP were "in response to current needs and trends in the area" and were needed to "strengthen its land use, transportation, [and] environmental and urban design components and to quantitatively define the Plan's policy objectives."

i. Comprehensive Plan and Code Provisions

{56} The Comprehensive Plan identified several issues associated with implementing the urban center concept contained in the 1975 Comprehensive Plan, a concept by which sector plans would delineate "clear, uniform design standards that would sketch each center's unique character, and their relationship to

surrounding neighborhoods." The Comprehensive Plan noted that land use, zoning, and transportation decisions made between 1975 and 1986 had undermined the effective implementation of the concept but observed that with rigorous support and effort to contain intense uses in designated urban center areas, the concept might succeed. The Council's finding was based in part on this language in the Comprehensive Plan.

{57} At the May 10 meeting of the LUPZ, Joel Water, the Albuquerque planning manager, explained that the Uptown Center was envisioned as having mixed urban uses with the highest building masses in the city. The idea of an intense core inside the Loop Road to ensure the urban nature of the area was discussed at the public workshop held on November 9, 1994. This idea was incorporated into the proposed revisions to the 81USP. From the review of the comments at the several meetings at which the revisions were discussed, it becomes clear that the revisions were designed to strengthen the urban nature of the area and prevent suburban sprawl. Requiring more intense uses in the very center of the Uptown Sector is a reasonable approach to meeting the definitional requirements of an Urban Center as defined in the Comprehensive Plan as it existed prior to the events in this case.

{58} As we have previously recognized in *West Bluff*, 2002-NMCA-075, ¶¶ 23-24, 132 N.M. 433, 50 P.3d 182, the Code has a three-tiered approach to land use. The City's master plan consists of a hierarchy of increasingly specific planning documents. *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. The Rank One Plan is the "basic long range city policy for the development and conservation of

the entire metropolitan area." Code § 14-13-1-2(A); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Rank Two Plans are Facility or Area Plans that typically cover "15 or more square miles, and specify important development standards." Code § 14-13-1-2(B); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Rank Three Plans, or Sector Plans, cover a much smaller area with the greatest level of specificity. Code § 14-13-1-2; *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. Sector Plans may "create special zoning regulations for the area covered, and may also specify other fairly detailed development parameters." Code § 14-13-1-2(C)(1); *W. Bluff*, 2002-NMCA-075, ¶ 23, 132 N.M. 433, 50 P.3d 182. The Code defines "Sector Development Plan" as follows:

> A plan, at a scale of 1 inch to 200 feet, or 1 inch to 400 feet, which covers a large area satisfactory to the Planning Commission, and specifies standards for the area's and sub-area's character, allowed uses, structure height, and dwellings per acre; the plan may specify lot coverage, floor area ratio, major landscaping features, building massing, flood water management, parking, signs, provisions for maximum feasible solar access, provisions for transportation, and other such features. Such plan constitutes a detailed part of the master plan and must be essentially consistent with the more general elements of the master plan, the Albuquerque/Bernalillo County Comprehensive Plan.

Code § 14-16-1-5.

{59} Section 14-16-2-24 of the Code governs the SU-3 Special Center Zone. An SU-3 zone is described as a zone that "allows a variety of uses controlled by a

plan which tailors development to an Urban Center; these include centers of employment, institutional uses, commerce, and high density dwelling." Code § 14-16-2-24. Unlike for other zones, the text of the SU-3 zone does not list permitted uses, prohibited uses, conditional uses, or the like. Instead, the text allows any use "consistent with the master plan and specified by a duly adopted Sector Development Plan," with the provision that "[s]pecifications contained in the Sector Development Plan shall control." Code § 14-16-2-24(A). An SU-3 zone was designed to be flexible; therefore, the creation of two areas, one requiring more intense uses than the surrounding area, is not inconsistent with this zone description. Thus, it was completely consistent with the Comprehensive Plan that development of suburban-type commercial establishments, such as Macaroni's, Toys-R-Us, and similar businesses, was permitted in the perimeter of the Uptown Sector; however, when such development was proposed for the center of the Sector, the City, again consistently with the Comprehensive Plan, disapproved the site development plan.

ii. Environmental Reasons

{60} We also look to the environmental reasons relating to the creation of the intense core. In Resolution 94-1995, the resolution adopting the 95USP, the City found that the sector plan affects the entire city and that the land use and transportation planning and development will affect the safety and air-quality management of the Albuquerque metropolitan area. With regard to the 95USP's effect on air quality, the district court made the following findings: (1) that the air-quality impact assessment showed no significant differences in air pollution between the current retail trends and the proposed

uses under the Revised Plan, (2) that the City's air-quality and traffic analysis showed that the only significant impact on air pollution would come from imposing stringent traffic-demand management measures on a regionwide basis, and (3) that no such regionwide measures were included in the Revised Plan. Our review of the whole record shows otherwise.

{61} At the joint meeting of the EPC and the LUPZ on May 24, 1995, the air pollution control division (division) planner reported on the air-quality impact analyses that were prepared for the 95USP. Based on evaluation of the report, the planner supported the mixed-use concept in the sector plan and felt that such land use would be the most beneficial for air quality. While the record does reflect a general assessment that there were no significant differences in air quality between the retail trends in effect at the time and the proposed sector plan uses, the planner explained that in terms of pollution levels, however, the proposed sector plan high-density uses would be "equal to or better than retail-based uses, despite having up to six times more floor area space within the central core." He also noted that "Uptown's specific travel demand management strategies, combined with the sector plan mixed uses, will produce greater air pollution reductions than the current trend retail-based uses." According to the planner's interpretation of the data, proposed "sector plan uses will be more conducive to averting [carbon monoxide] violations than retail-based use[s]." At the May 30, 1995, LUPZ meeting, a division planner countered ACP's characterization of the data as showing no difference in air quality, based on land use. The planner explained that there will be "fewer exceedances of the carbon monoxide standards with

the mixed uses" in the proposed sector plan if the plan is combined with "any amount" of transportation management strategies. Thus, the district court's finding that the only significant impact would come from stringent regionwide traffic measures is only one interpretation of the evidence, an interpretation rejected by the City.

{62} Additionally, the 95USP specifies the need for transportation management strategies as an adjunct to the mixed-use concept and contains transportation management goals related to improving air quality. The 95USP also requires new projects to have traffic mitigation plans that assess the impact of the project and outline measures that will be implemented to reduce traffic. Further, Resolution 94-1995 itself requires the establishment of a representative public-private task force to "[r]ecommend policies, standards and programs for traffic reduction and congestion management citywide that are similar to those implemented in Uptown." Therefore, contrary to the district court's findings, we find that the record demonstrates the reasonableness of the City Council's interpretation of the air-quality studies and the City Council's ultimate decision to approve the 95USP. *Tallman v. ABF (Ark. Best Freight)*, 108 N.M. 124, 129, 767 P.2d 363, 368 (Ct.App.1988) ("The possibility of drawing two inconsistent conclusions from the evidence does not mean the agency's findings are unsupported by substantial evidence."). On whole record review, a reviewing court must uphold the zoning authority's decision if that decision is supported by substantial evidence. *Paule v. Santa Fe County Bd. of County Comm'rs*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240. The reviewing court may not substitute its judgment merely because there is evidence supporting a different conclusion. *Id.*

4. Resolution 270-1980

{63} The district court determined that the 95USP created a new zone, subject to Resolution 270-1980; that there was no substantial evidence that the City complied with this resolution; and, further, that ACP's property was downzoned, in violation of Resolution 270-1980. The City counters, arguing that Resolution 270-1980 does not apply in this case because the 95USP was accomplished by a text amendment and text amendments are not covered by the resolution. We agree with the City.

{64} Resolution 270-1980 states the following:

> ADOPTING POLICIES FOR ZONE MAP CHANGES AND SUPERSEDING CITY COUNCIL RESOLUTIONS 217-1975 AND 182-1978 RELATING TO ZONE CHANGE APPLICATIONS AND APPEALS.
>
> WHEREAS, the usefulness of the Comprehensive City Zoning Code in implementing the City's Comprehensive Plan and promoting health, safety, morals, and general welfare is enhanced by a reasonable flexibility in order to deal reasonably with changes in the physical, economic, and sociological aspects of the city; and
>
> WHEREAS, certain general policies for consideration of zone map changes and other zoning regulation changes should be recognized as determinative.
>
> BE IT RESOLVED BY THE COUNCIL, THE GOVERNING BODY OF THE CITY OF ALBUQUERQUE:
>
> Section 1. The following policies for deciding zone map change applications pursuant to the Comprehensive City Zoning Code are hereby adopted:

A. A proposed zone change must be found to be consistent with the health, safety, morals, and general welfare of the City.

B. Stability of land use and zoning is desirable; therefore, the applicant must provide a sound justification for the change. The burden is on the applicant to show why the change should be made, not on the City to show why the change should not be made.

C. A proposed change shall not be in significant conflict with adopted elements of the Comprehensive Plan or other City master plans and amendments thereto including pr[i]vately developed area plans which have been adopted by the City.

D. The applicant must demonstrate that the existing zoning is inappropriate because

(1) there was an error when the existing zone map pattern was created, or

(2) changed neighborhood or community conditions justify the change, or

(3) a different use category is more advantageous to the community, as articulated in the Comprehensive Plan or other City master plan, even though (1) or (2) above do not apply.

E. A change of zone shall not be approved where some of the permissive uses in the zone would be harmful to adjacent property, the neighborhood or the community.

F. A proposed zone change which, to be utilized through land development, requires major and unprogrammed capital expenditures by the City may be

(1) denied due to lack of capital funds or

(2) granted with the implicit understanding that the City is not bound to provide the capital improvements on any special schedule.

G. The cost of land or other economic considerations pertaining to the applicant shall not be the determining factor for a change of zone.

H. Location on a collector or major street is not in itself sufficient justification of apartment, office, or commercial zoning.

I. A zone change request which would give a zone different from surrounding zoning to one small area, especially when only one premise is involved, is generally called a "spot zone." Such a change of zone may be approved only when

(1) the change will clearly facilitate realization of the Comprehensive Plan and any applicable adopted sector development plan or area development plan; or

(2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones; because the site is not suitable for the uses allowed in any adjacent zone due to topography, traffic, or special adverse land uses nearby; or because the nature of structures already on the premises makes the site unsuitable for the uses allowed in any adjacent zone.

J. A zone change request which would give a zone different from surrounding zoning to a strip of land along a street is generally called "strip zoning." Strip commercial zoning will be approved only where

> (1) the change will clearly facilitate realization of the Comprehensive Plan and any adopted sector development plan or area development plan, and
>
> (2) the area of the proposed zone change is different from surrounding land because it could function as a transition between adjacent zones or because the site is not suitable for the uses allowed in any adjacent zone due to traffic or special adverse land uses nearby.
>
> Section 2. City Council Resolutions 217-1975 and 182-1978 adopting policies for zone map change applications and appeals of Environmental Planning Commission are hereby superseded.

Resolution 270-1980. Interpretation of the language of a resolution related to zoning is similar to interpretation of a zoning ordinance. Such interpretation is a matter of law, which we review de novo using the same rules of construction that apply to statutes. *Smith*, 2005-NMSC-012, ¶ 18. We begin by reviewing the "plain language" of the resolution. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 5, 126 N.M. 413, 970 P.2d 599. We give words their ordinary meanings, without adding terms the enacting body did not include, unless a different intent is indicated. *Id.*

{65} The title of the resolution refers to the adoption of zone map changes and then indicates that the resolution is to supercede certain resolutions relating to applications and appeals. The text of the lettered subsections of Section 1 of the resolution deals exclusively with zone change applications and sets forth what information is required and who has the burden

to supply the justification for a zone change. No other type of application is mentioned in Section 1. Importantly, the wording of Section 1 indicates that the adopted policies are for deciding "*zone map change applications*." (Emphasis added.) Section 2 effectively repeals previous resolutions regarding zone map change applications and appeals to the EPC. Giving the words in this resolution their ordinary meanings, we find it clear that the main text of Resolution 270-1980 (i.e., Section 1) refers to zone map changes only and that the policies do not apply to text amendments or to amendment of sector development plans that do not involve zone map amendments, as in this case. Reading the resolution in its entirety, we also find it clear that the "other zoning regulations" in the second "whereas" clause can only refer to the repeal portion of the resolution set out in Section 2 of the resolution.

{66} The language of Resolution 270-1980 was also considered in *Hart v. City of Albuquerque*, 1999-NMCA-043, ¶¶ 19-24, 126 N.M. 753, 975 P.2d 366. This Court described the resolution as articulating "the policies for approving a zone map change." *Id.* ¶ 20. Our conclusion is further buttressed by the language contained in Section 14-16-4-1 of the Code, setting forth the amendment procedure. Zone map amendments and text amendments are treated distinctly. *See* Code § 14-16-4-1. *Compare* Code § 14-16-4-1(A)(3), which deals with zone map amendments, *with* Code § 14-16-4-1(A)(4), which deals with text amendments; *compare* Code § 14-16-4-1(C), which sets forth the procedures for hearings and decision for proposed zone map amendments, *with* Code § 14-16-4-1(D), which contains the procedures for hearing and decision for text changes. Amendment to a sector plan can be accomplished by amend-

ment of a zone map, amendment to the text of the sector plan, or both. Code § 14-16-4-3(A)(4), (5). When the amendment to a sector plan is by text amendment only, the application is subject to the same procedures as changes to the text in the Code, as described above. Code § 14-16-4-3(A)(5).

{67} The City's application form for the amendment of an adopted plan also separates out the types of action into two categories: "application for amendment" and "type of request." The category "application for amendment" allows the applicant to indicate the type of document to be amended: (1) Comprehensive Plan, (2) area or facility plan, or (3) neighborhood, corridor, or sector plan, or (4) other. Under "type of request," there are three choices: (1) map amendment, (2) policy or text amendment, or (3) other. The planning department completed an application to revise the sector plan; on that application, the department checked the box indicating the department was submitting an amendment to revise a sector plan by text amendment, not by map amendment. The City's zoning documents contemplate amendment to the zoning code by different methods, similar to the types of rezonings categorized by Ziegler that we outlined previously in paragraph 42 herein. Accordingly, based on the language of Resolution 270-1980 and our conclusion that the revisions to the 81USP were text amendments, we reverse the district court's conclusion that the City failed to follow the provisions of this resolution.

5. Downzoning

a. Generally

{68} Rezoning by map amendment or by text amendment may involve a downzoning. 3 *Rathkopf's, supra* §§ 38:2 to 38:3, at 38-3. As described in *Rathkopf's*,

the term "downzoning" is used to describe a rezoning to a less intensive use; examples include reclassification from industrial to residential or, as is often the case, a reduction in permitted residential density. 3 *Rathkopf's, supra* § 38:13, at 38-10. "Downzoning" is an informal word of art that almost never appears in the statutes or ordinances. 3 *Rathkopf's, supra* § 38:12, at 38-8. In New Mexico, "downzoning" is defined as "rezoning property to a more restrictive use." *Mandel*, 119 N.M. at 688, 894 P.2d at 1044. Downzoning normally involves only a single landowner and a small piece of property. *Id.* at 688-89, 894 P.2d at 1044-45. Although the definition does not specifically include text amendments, we look to *KOB-TV* and *Mandel*, two cases in which we evaluated the actions of a zoning authority in the context of a text amendment, to determine if a specific property had been downzoned. *KOB-TV*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708; *Mandel*, 119 N.M. at 688, 894 P.2d at 1044. In neither case did we find a downzone. *KOB-TV*, 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708; *Mandel*, 119 N.M. at 689, 894 P.2d at 1045.

{69} In determining that the City's revision of the Uptown Sector Plan constituted a downzoning of ACP's property, the district court determined that this case was factually similar to *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982). There, the City adopted a zoning map amendment pursuant to an amendment of the Comprehensive Plan. *Id.* at 320, 648 P.2d at 778. An eight-block area in the sector plan was downzoned from R-3 to SF, while the remaining area was allowed to continue in the same density. *Id.* at 321, 648 P.2d at 779. The Davis property, four contiguous lots on Silver SE, was included in the area that was downzoned from R-

3 to SF. *Id.* at 320, 648 P.2d at 778. Our Supreme Court determined that this downzoning was subject to the "change or mistake" rule adopted in *Miller*, 89 N.M. at 506, 554 P.2d at 668, even though the zoning change was done in conjunction with a revision of the sector plan. *Davis*, 98 N.M. at 320-21, 648 P.2d at 778-79. It was clear in *Davis* that the action of the zoning authority was downzoning, as it changed the zoning designation from medium-density residential to single-family residential. *Id.* at 320, 648 P.2d at 778. Further, the Court in *Davis* determined that the rezone was un-reasonable because it was inconsistent with the stated purpose of the Comprehensive Plan. *Id.* at 321, 648 P.2d at 779. The zoning change applied the restrictive zoning to a single landowner and left unaffected others who were similarly situated. *Id.* The Court acknowledged that its holding was not an attempt to limit the flexibility of a zoning authority to rezone, as long as the rezoning is reasonable, but found the facts insufficiently distinguishable from the *Miller* case to remove the *Davis* case from the "change or mistake" rule. *Id.* The Court determined that there was, in fact, an unreasonable rezoning of a small piece of land. *Id.*

{70} In our case, there is no change to the zoning map. The zoning remains SU-3, Special Use Center, with site development approval required. The revisions affect the type of commercial uses and require high-density uses in the inner core, which were simply a quantification of what was envisioned by the 81USP and what the City would have had the right to approve or disapprove under the 81USP in any event. There is no change in the fact that any development will have to get City approval. Contrary to *Davis*, the changes here were entirely consistent with the City's master plan and its vision of an

uptown urban center. Again, we look to the evidence in the record, which disclosed that after a good deal of study and reports from experts on traffic, air quality, and transportation, as well as feedback from city planners and neighborhood associations, the City made a policy decision regarding future development in the Uptown Sector. This policy decision was made in connection with a planning document whose purpose was to give more guidance to developers in the urban Uptown Sector. The policy decision was entirely consistent with the City's master plan, which designates Uptown as an urban center. These facts are different from those in *Davis* and *Miller* and support a different conclusion.

{71} The restrictions in the 95USP simply quantified and made more specific the vision that was already stated generally in writing in the Comprehensive Plan and the 81USP and delineated how that vision would specifically come to pass in future development. Further, contrary to *Davis*, the changes here apply not only to ACP but to all property owners in the intense core. Thus, ACP was not being treated differently from other similarly situated landowners in the core of the Uptown Sector. There was no downzoning here.

b. Targeting

{72} ACP maintains that the City targeted ACP's property and thereby effected a downzone, requiring due process and a quasi-judicial hearing. We have already rejected, in paragraphs 36-39 herein, ACP's contention regarding the necessity for a due process quasi-judicial hearing. As to the targeting, ACP relies on *Nasierowski Brothers Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-96 (6th Cir.1991), and on *Harris v. County of Riverside*, 904 F.2d 497,

501-03 (9th Cir.1990), which are distinguishable. In both cases, a rezoning occurred, resulting in fundamental change to the uses allowed on a landowner's property; however, in neither case had the municipality given the owner notice of the change, so the landowner had no chance to protest. The cases were reversed, based on lack of notice. In our case, ACP had notice and objected to the revisions as they worked their way to the City Council for action. In addition, there was no targeting, and there was no fundamental change.

{73} The targeting argument was also made in *KOB-TV*: the TV station asserted that it had been targeted, and it contended that the elimination of helipad use as to its property was site specific. 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708. We have already dealt with this argument in paragraph 39 of this opinion. As we explained in *KOB-TV*, the challenged amendment established policy for the entire city and was "not one in which a single property was rezoned to a more restrictive use." *Id.* In this case's record, there is substantial evidence that adoption of the 95USP established policy for the entire city, and our review of the record supports the conclusion that ACP was one of several landowners in the inner core that became subject to the new requirements. While we agree that there is an opposing view of the evidence on this issue, as long as there was substantial evidence on the issue, it was up to the City Council, not the reviewing court, to make the final decision. *See Paule*, 2005-NMSC-021, ¶ 32, 138 N.M. 82, 117 P.3d 240.

6. "Change or Mistake" Rule

{74} The "change or mistake" rezoning doctrine was first adopted in Maryland, then Mississippi, and has

been adopted to varying degrees in a minority of states, including New Mexico. 3 *Rathkopf's, supra* §§ 42:2 to :3, at 42-3 to -5 (footnotes omitted) (listing in a footnote a number of jurisdictions in which the "change or mistake" doctrine has been adopted to varying degrees). In New Mexico, *Davis* and *Miller* stand for the proposition that anyone seeking to rezone an owner's property to a more restrictive zoning must show either that there was a mistake in the original zoning or that since the original zoning, a substantial change has occurred in the character of the neighborhood to such an extent that the reclassification or change ought to be made. *Davis*, 98 N.M. at 320, 648 P.2d at 778; *Miller*, 89 N.M. at 506, 554 P.2d at 668. Both cases dealt with rezoning by map amendment. *Davis*, 98 N.M. at 320, 648 P.2d at 778 (changing the property classification from R-3, medium- to high-residential density, to SF, single-family residential); *Miller*, 89 N.M. at 504, 554 P.2d at 666 (amending zoning classifications of R-1 and R-3 to the more restrictive classification of SU-1). In our case, the rezoning was accomplished by text amendment to a sector plan; the zoning designation remained the same.

{75} In *KOB-TV*, we recognized that the "change or mistake" rule does not apply to rezoning by text amendment. 2005-NMCA-049, ¶ 27, 137 N.M. 388, 111 P.3d 708 (acknowledging that the "change or mistake" rule applies when there is rezoning to a more restrictive classification but recognizing that there was no change in the zoning of KOB's property). This Court rejected KOB's claim that the city's actions amounted to a downzoning that required a change or mistake in the original zoning. *Id.* In paragraph 74 herein, we have already held that the City's action was not downzoning. We also hold that the

"change or mistake" rule does not apply to rezoning by text amendment. This is consistent with our reading of 3 *Rathkopf's, supra* § 42:3, at 42-3 to -5, specifically footnote 3, wherein all of the cases cited relate exclusively to rezoning by map amendment. *See* 1 Williams, *supra* § 33:1, at 837 (describing the rule as applying to changes in the zoning map).

{76} Although our reliance on *KOB-TV* disposes of the issue, we explain why we decline to expand application of the rule to text amendments. First, any enlargement of the doctrine to rezoning by text amendment would be a first; currently, the "change or mistake" rule employed in other jurisdictions applies to map amendments only. *See* 3 *Rathkopf's, supra* § 42:3, at 42-3 to -5; 1 Williams, *supra* § 33:1, at 837. Second, we are concerned that the rule itself is the minority position and that it is often criticized. The rule has been described as a "clear example of a legal doctrine based upon a misunderstanding of the nature of the planning process." 1 Williams, *supra* § 33:1, at 837. The "change or mistake" rule has been almost exclusively a Maryland doctrine, with few exports to other states, and has "occasionally turned up in other states with less experience in zoning litigation." *Id.* at 838. Further, this rule has been criticized as giving the original zoning a greater presumption of correctness than the amendment and has thereby prevented the zoning authority from making zone changes, no matter how reasonable and desirable they may be. *Neuzil v. City of Iowa City*, 451 N.W.2d 159, 165 (Iowa 1990). While we recognize that the specific facts of *Miller* and *Davis* dictated the application of the "change or mistake" rule to those cases, we also observe that in *Davis*, the Court recognized the importance of allowing the zoning authority to make reasonable changes and seemed to

limit the application of the "change or mistake" rule to the situation in that case. 98 N.M. at 321, 648 P.2d at 779 (stating that "a more reasonable downzone or a more reasonable comprehensive plan might be sufficient to remove the case" from application of the rule). For these reasons, we are reluctant to extend the rule.

{77} ACP cites to *West Old Town Neighborhood Ass'n* as support for the district court's application of the "change or mistake" rule. In that case, the sector development plan had established the zoning for the area covered by the plan, which included land inside and outside the city limits. *W. Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 4, 122 N.M. 495, 927 P.2d 529. The applicant filed an annexation petition to annex certain land into the city and also sought to amend the sector plan to allow RA-2 zoning. *Id.* The land in question had been zoned RA-1 in the sector plan. *Id.* The city approved the annexation but rezoned the annexed land to SU-1; it also amended the sector plan to permit the new SU-1 zoning on this particular property. *Id.* ¶ 6. The city's planning ordinance, however, contained a procedure to be followed when a requested zoning change was different from the zoning designation already contained in an existing sector plan; the procedure required the filing of two applications: one to amend the zoning map and another to amend the sector plan. *Id.* ¶ 16. This Court reversed the decision of the city because it failed to comply with its own requirements for zoning map and sector map amendments. *Id.* ¶ 27. Our discussion of the "change or mistake" rule was made in the context of the rule's application to a change in the zoning designation from RA-1 to SU-1. *Id.* ¶ 22. Here, as we have explained above, there is no conflict between the zoning designation in the 81USP and the

95USP; the zoning classification remains SU-3. Unlike the situation in *West Old Town Neighborhood Ass'n*, there is no requirement here that the zoning map be amended; therefore, the "change or mistake" rule is inapplicable.

III. CONCLUSION

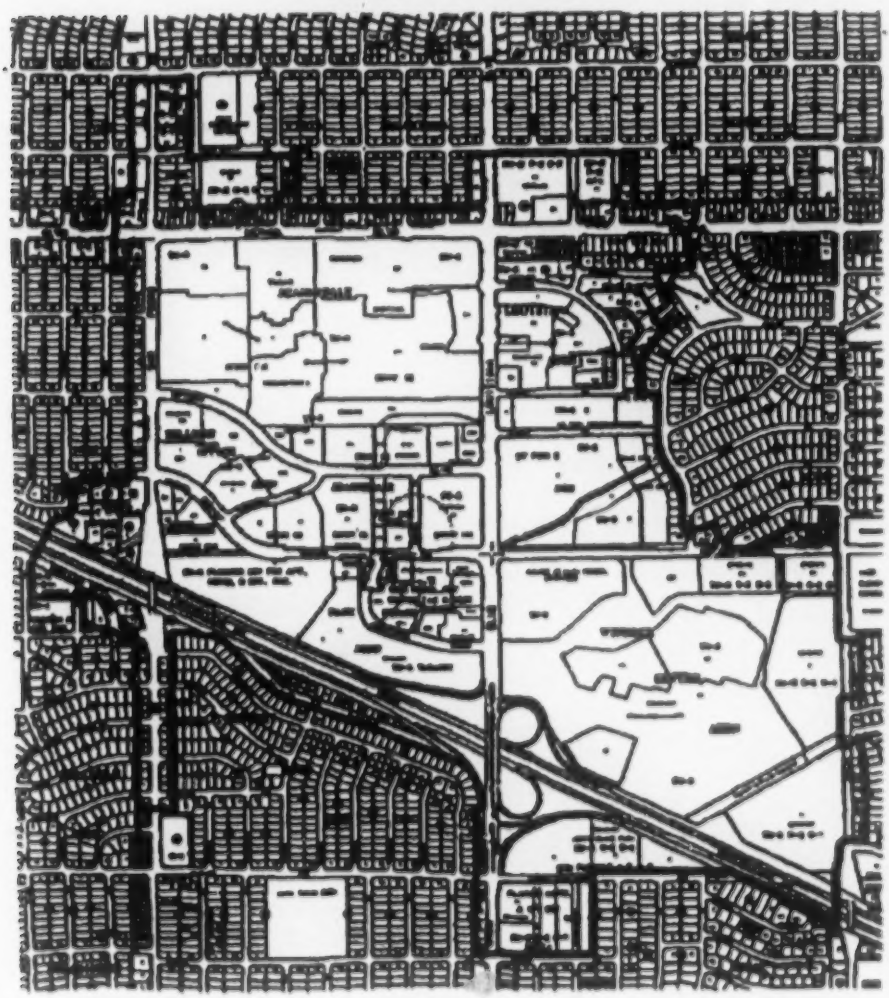
{78} We hold that the 1995 revisions to the Uptown Sector Plan were legislative action establishing area-wide policy for the future development of the Uptown Sector. We reverse the district court's determination that the revisions downzoned ACP's property. Likewise, we reverse the district court's order remanding to the City to consider the Opus site plan under the 81USP. Therefore, the district court's later order requiring approval of the plan is reversed as a nullity. We note that even if the plan were required to be reviewed under the 81USP, the City would have discretion to deny it as inconsistent with the Comprehensive Plan. Finally, because the basis of the jury's verdict was the downzoning of ACP's property without a quasi-judicial hearing, which resulted in multiple violations of the United States Constitution, we reverse the jury verdict.

{79} *IT IS SO ORDERED.*

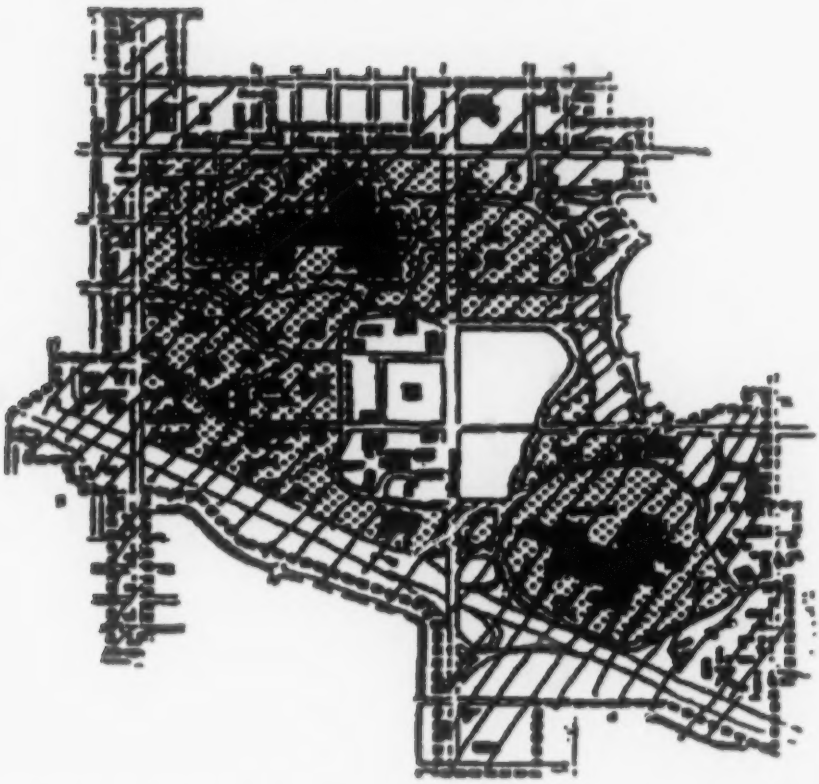
WE CONCUR: MICHAEL D. BUSTAMANTE, Chief Judge, and LYNN PICKARD, Judge.

APPENDIX A

UPTOWN SECTOR DEVELOPMENT PLAN
PARCEL ZONING

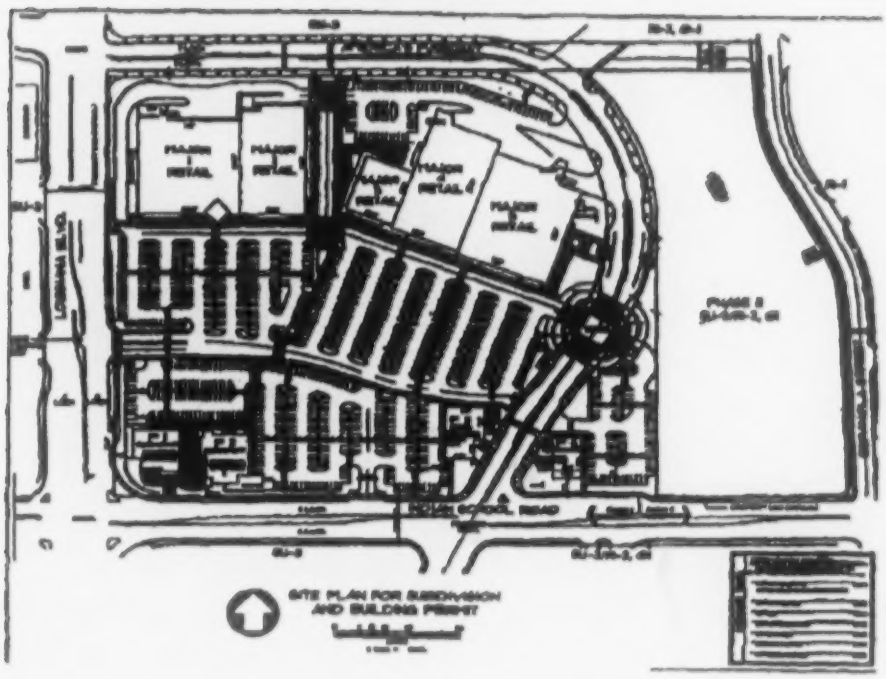


APPENDIX B



Unlined area is inner core surrounded by Loop Road.

APPENDIX C



CASTILLO, *Judge*.

{80} In its motion for rehearing and the briefs in support of the motion, ACP raises four issues that are the subject of this order: ACP's contention that the City erred in amending the 81USP by resolution, instead of by ordinance; ACP's contention that this opinion will now allow municipalities to change zoning by words, instead of by maps; ACP's allegation that this Court misunderstood the specific zoning of the Uptown area; and ACP's position that the takings verdict should stand. We address each issue in turn.

I. ISSUES

A. Resolution Versus Ordinance

{81} ACP contrasts the language of Section 14-16-4-1(D) of the Code, which directs that text amendments be made by ordinance, with Section 14-16-4-1(C)(9) of the Code, which does not require an ordinance to effect zone map amendments. ACP then contends that because the amendments to the 81USP were made by resolution and not by ordinance, the City did not follow its own procedures and, further, that use of a resolution, instead of an ordinance, evidences the City's intent to amend the 81USP by zone map amendment.

{82} While we agree that the zoning code does contemplate that amendments to the text of the code be made by ordinance, the adoption of the 95USP by resolution does not end the inquiry. A similar argument was made in *West Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 12, 122 N.M. 495, 927 P.2d 529. Our analysis in that case was based on the premises that when a resolution is in substance an

ordinance or a permanent regulation, the name given to the resolution is immaterial, and that if it is passed with all the formality of an ordinance, the resolution thereby becomes a legislative act. Thus, it is not critical whether it be called an ordinance or a resolution. There is no argument here that the 95USP was not adopted with the same formality as that of an ordinance. There were numerous hearings on the proposed amendments to the 81USP, and the City Council finally adopted the resolution on a 7-0 vote. Consequently, we will not "violate a basic tenet of judicial review by exalting form over substance." *W. Old Town Neighborhood Ass'n*, 1996-NMCA-107, ¶ 13, 122 N.M. 495, 927 P.2d 529.

B. Zoning by Words

{83} ACP contends that our opinion will allow municipalities to actually change zoning by the vehicle of text amendments. We disagree because we have held that the text amendment here did not actually change the zoning. We appreciate ACP's concern, but it does not apply to the facts of this case. Further, "[s]hould such a course of procedure be pursued in other cases, we will know how to deal with it." *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 627, 495 P.2d 1073, 1074 (1972).

C. Zoning in the Uptown Sector

{84} ACP characterizes the zoning in the Uptown Sector under the 81USP as "SU-3 Zone for the Uptown Metropolitan Urban Center" and maintains that this Court erroneously concluded that the zoning for this part of Uptown is the generic "SU-3 Special Center Zone." ACP misreads the opinion. In paragraph 59 of the opinion, we discussed the definition of SU-3 as set out in the Code, and we

focused on the flexibility allowed by this type of zoning. The areas within the boundaries of the City are divided into basic zones, and SU-3 is one of the zones. Code § 14-16-2-1. Uses must be consistent with the master plan and may be specified by a duly adopted Sector Development Plan. Code § 14-16-2-24(A). "Specifications contained in the Sector Development Plan shall control." *Id.* ACP argues that we mistakenly considered the intense core as zoned "SU-3 Special Center Zone" without any specification of permitted uses, while the land was in fact zoned "SU-3 Zone for the Uptown Metropolitan Urban Center" with specific allowance of uses that are for the most part permissive in C-2 zones. The denomination "SU-3 Zone for the Uptown Metropolitan Urban Center" does not zone this area. It is the title of this section of the 81USP and does not affect the SU-3 zoning designation. The additional language merely indicates the location of the SU-3 Zone. We agree with ACP that the 81USP lists permitted uses in the SU-3 Zone; our points were that SU-3 zones can have different permitted uses and that this is allowed under this type of zoning designation. ACP also seems to be arguing that all permitted uses listed in the 81USP are allowed. This is not the case. Even though a use is permitted, that use as set out in a proposed site development plan might not be approved. All permissive uses are "subject to site development plan approval," and in the approval of a site development plan, requirements may be imposed "as may be necessary to implement the purpose of [the 81USP]."

D. Takings Verdict

{85} This case was tried to a jury on alternative theories: violation of procedural due process resulting

in damages and a claim of a constitutional taking. The jury awarded damages on both claims. ACP then elected judgment on the due process violation to prevent a double recovery; judgment was entered thereon. ACP reads our opinion to reverse the due process judgment and asks this Court to clarify the effect of the opinion on the takings verdict, which ACP contends was not affected because there was evidence supporting the theory of takings involving the denial of all economically viable use of ACP property and this theory was not affected by our opinion. The City understands the opinion to reverse the takings verdict. We agree that this issue should be clarified, and we agree with the City.

{86} The parties take opposite views on the effect of ACP's electing judgment on the due process verdict. Citing to *Grogan v. Garner*, 806 F.2d 829, 839 (8th Cir.1986), ACP contends that if one verdict is lost on appeal, the judgment should be modified to substitute the other verdict. The City contends that ACP has forfeited its right to resurrect the takings verdict because a judgment of dismissal was entered on the verdict and because ACP did not appeal and thus waived the issue. Since we are reversing the takings verdict on a separate ground, we need not address the effect of the election of verdicts on this case.

{87} ACP relied on two experts to prove that the City had denied ACP all economically viable use of its property: Anne Ricker and Michael Halsey. Both experts opined that the 95USP prevented any type of development on the property that would be economically feasible for ACP. What they failed to take into account, however, was the effect of the 81USP. Ms. Ricker testified that she made no analysis as to whether the site plan "was approvable under the

1981 Sector Plan." Mr. Halsey agreed with Ms. Ricker's opinion, and his testimony contained no information about the effect of the 81USP on the site plan. The effect of our opinion has been to uphold the City's denial of the site plan under the 81USP. This fact was not considered by the experts in coming to their opinions, and their opinions were expressly based on the idea that the 95USP did something to ACP's right to develop the property that was different from the 81USP; therefore, those opinions cannot provide the basis for the damages awarded in this case. *See Grudzina v. N.M. Youth Diagnostic & Dev. Ctr.*, 104 N.M. 576, 582, 725 P.2d 255, 261 (Ct.App.1986) (observing that "an expert's opinion is only as good as the factual basis for it"); *Niederstadt v. Ancho Rico Consol. Mines*, 88 N.M. 48, 51, 536 P.2d 1104, 1107 (Ct.App.1975) (stating that if the expert who testifies lacks pertinent information, his or her opinion cannot satisfy the burden imposed by the applicable statute). Since ACP's proposed development could not have been built under the 81USP, no damages could have resulted from similar prohibitions under the 95USP, and ACP therefore failed in its burden to prove that the 95USP effected an unconstitutional taking caused by the denial of all economically viable use of the property. Accordingly, we reverse the takings verdict.

II. MOTIONS

{88} All motions filed after the motion for rehearing are hereby denied.

{89} *IT IS SO ORDERED.*

WE CONCUR: MICHAEL D. BUSTAMANTE, *Chief Judge*, and LYNN PICKARD, *Judge*.

APPENDIX D

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

[Filed Jul. 23, 1999]

CV-95-06031

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner,

vs.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—COUNTS I & II OF THE SECOND AMENDED PETITION.

THIS MATTER having come on for hearing by the Court, the Court having received extensive oral and written arguments from the parties, and having conducted a whole record review of the record proper, the Court makes the following findings of fact and conclusions of law.

1. *Findings of Fact*:

   a. The 1995 Revised Uptown Sector Plan creates a new zone: the intense urban core.

   b. That core consists of 50.65 acres, of which Petitioner leases 17.90 acres and Albuquerque Public Schools own 7.52 acres.

c. Those two properties and a smaller property are the only vacant lands in the intense urban core.

d. Winrock and Coronado Centers are outside this intense urban core.

e. All the land inside the intense core and most of the land outside in Uptown is zoned SU-3, but the regulations for use inside and outside the core are markedly different.

f. Outside the intense urban core, retail and commercial uses, including shopping centers, are allowed for existing uses, and for redevelopment and replacement of existing space. Only brand new retail development is restricted.

g. Inside the intense core, no shopping centers are allowed and retail uses are limited to 20,000 sq.ft. per "establishment", and to no more than 10% of the developed floor space. Inside the core, the required floor area ration (FAR) is very intense (0.7 to 1.5 FAR). Outside, the development may be less intense (0.3 to 1.0 FAR). Outside the core, parking lots are allowed. Inside the core, the parking must be on site in a parking structure.

h. There are additional restrictions on land use inside the core that are not imposed outside the core.

i. The most burdensome of the new requirements contained in the 1995 Revised Uptown Sector Plan fall on Petitioner, and on the owner of two other parcels, one of which is small.

j. The Middle Rio Grande Council of Governments air quality impact assessment (dated May 16, 1995) showed that there were no significant differences in air pollution between the current retail trends and the proposed uses under the Revised Plan.

k. The City's own air quality and traffic analysis showed that the only significant impact on air pollution would come from imposing stringent Traffic Demand Management (TDM) measures on a region wide basis.

l. No such measures were included in the 1995 Revised Sector Plan.

m. City Resolution 270-1980 requires that rezoning decisions must be based on an error in the existing zoning map, on changed neighborhood or community conditions or on the premise that a different use category would be more advantageous to the community.

n. The City made no findings and does not now take the position that there was an error in the original Uptown Sector Plan.

o. The only condition cited by the City Council was motor vehicle use threatening air quality standards; and it is not explicitly stated as a changed condition.

p. Assuming it is a changed condition, the Plan revisions have no appreciable impact on this condition.

2. *Conclusions of Law:*

a. The City Council is the planning and zoning authority of the City of Albuquerque.

b. The City Council has the authority to enact and amend Sector Development Plans.

c. To the extent that the City based its burdening Petitioner's property with these markedly different and more stringent regulations on an assumption that imposition of these regulations would make a positive difference on traffic congestion and air pollution, there was no substantial evidence to support that conclusion.

d. There is no substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in the community conditions justified this revision to the 1981 Uptown Sector Plan, or that the amendments were more advantageous to the community.

e. There was no substantial evidence that the community would be advantaged by the application of the most rigorous and burdensome requirements, which set highly intense FARs, decimated allowable retail use and required structured parking for very few properties, while allowing much less restrictive development outside of the urban core of Uptown.

f. The creation of the intense urban core of the Revised Uptown Sector Development Plan amounted to a down zoning of the property in which Petitioner has a lease hold interest.

g. The *Miller* rule pertains not only to piecemeal rezoning, but to any unreasonable rezoning of only a small piece of land; see

Davis v. City of Albuquerque, 98 N.M. 319, 648 P.2d 665 (1976).

h. There is no substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in community conditions justified this revision to the 1982 Uptown Sector Plan, or that the amendments were more advantageous to the community.

i. Demonstration of one of these factors is especially important when it is the City that is initiating the change and the change, as it is here, is more restrictive.

j. Petitioner's property was down zoned contrary to the *Miller* rule and in violation of City Resolution 270-1980.

k. The zoning action was a quasi-judicial act by the City Council of the City of Albuquerque, *Dugger v. City of Santa Fe*, 114 N.M. 47, 834 P.2d 424 (Ct.App.1992), and as such is subject to whole record review by this Court. *West Old Town Neighborhood Assn. v. City of Albuquerque*, 122 N.M. 495, 927 P.2d 529 (Ct.App.) *cer. denied* (1996).

l. Where the zoning body participates in the decision-making process, both as petitioner and as judge, it must follow its own rules.

m. By failing to give reasons for its changes to the 1981 Uptown Sector Plan, the City Council failed to comply with its own procedures and deprived Petitioner of procedural due process.

n. By hearing its own application for amendments to the Uptown Sector Plan without providing Petitioner with procedural safeguards, the City Council deprived Petitioner of its right to a meaningful and impartial decision-maker.

All requested findings and conclusions not consistent herewith are refused.

/s/ SUSAN M. CONWAY
SUSAN M. CONWAY
District Judge

APPENDIX E

[SEAL]

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT
DIVISION XVIII

CHAMBERS OF
SUSAN M. CONWAY
DISTRICT JUDGE

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June 17, 1998

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RE: *Albuquerque Commons Partnership v. City of Albuquerque*
NO. CV 95-6031

Dear Counsel:

The Court has finally made its decision on the whole record review in this case. There were many reasons (but few excuses) for taking this long to decide this aspect of the case: the time it took to per-

sonally review the 2356 pages of the record[1]; the time it took to read, analyze, reread and reanalyze the case law, ordinances and statutes; and the fact that counsel's factual summaries created more disputes and confusion than they were intended to prevent.

The principal reason for the delay, however, was the fact that this case simultaneously looked like two irreconcilably inconsistent cases. One case is the story of a very careful, thorough, inclusive process of developing creative legislation to amend the Sector Development Plan of a critical section of the city, a model of staff expertise provided from all relevant city departments, input from all the various interests to be affected by a revised Sector Development Plan, both in writing and at the many hearings held on the Plan, consideration of competing interests by LUPZ and the EPC, and final decision by the City Council, followed by approval from the Mayor.

The goals expressed in the Revised Plan are laudable, and the City is correct in its determination that enhancing Uptown's urban character is important to Albuquerque as a whole. The regulations for orientation of uses, landscaping, street treatments, parking, enhancement of the pedestrian environment and open space are especially well thought out and show the results of the City's expertise and of the extensive neighborhood and other community input into the process. Viewed as legislation, without considering who will bear the burden of that enhancement, there

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[1] Pages 670-672 and 674-675 are missing from the record provided to the Court. They consist of two letters from the Petitioner, to the City attorney and to Council President Griego, respectively. It is highly doubtful they contain material the Court has not already reviewed.

is little to criticize, and nothing Plantiff and Court should overrule.

There is another case, however. In the second case, the City has placed a burden on the Petitioner of fulfilling a vision the community has created for Uptown, after the City has allowed prior development contrary to that vision. R. 624, 903. The most burdensome of the new requirements fall on Petitioners, on Albuquerque Public Schools and on the owner of another small parcel in Uptown.

The second case also involves the City's basing its burdening Petitioner on an assumption that this imposition would make a positive difference in traffic congestion and air pollution. The City learned from the Middle Rio Grande Council of Governments (MRCOG), in its May 16, 1995 air quality impact assessment, that there were no significant differences in air pollution between the current retail trends and the proposed uses under the revised Plan. Every analysis showed that the only significant impact on air pollution would come from imposing stringent Traffic Demand Management (TDM) measures on a region wide basis. Such measures are not in the Revised Plan. R. 1260, 901-956.

Which case is the one before the Court? There have been times in my review when I have been sure this is the first case, and times when I have been equally sure it is the second case. After much thought and review of the facts and the law, however, I have come to the final conclusion that this is the second case, that the City's Uptown Sector Development Plan cannot be applied to Petitioner's property, and that the Petitioner's proposed site development plan must be reviewed under the previous Sector Plan.

The legal analysis follows:

1. The 1995 Revised Uptown Sector Plan creates a new zone: the intense urban core. That core consists of 50.65 acres, of which Petitioner leases 17.90 and Albuquerque Public Schools owns 7.52 acres. R. 733. Those two properties and a smaller property are the only vacant lands in the intense urban core, which is bounded by the existing loop road west of Louisiana Boulevard. Winrock and Coronado Centers are outside this urban core.

All the land inside this intense core and most of the land outside it in Uptown is zoned SU-3, but the regulations for use inside and outside the core are markedly different. Outside the core, retail and commercial uses, including shopping centers, are allowed for existing uses, and for redevelopment and replacement of existing space. Only brand new retail development is restricted. Inside the core, no shopping centers are allowed, and retail uses are limited to 20,000 square feet per "establishment", and to no more than 10% of the developed floor space. Inside the core, the required floor area ratio (FAR) is very intense, a minimum of 0.7 and a maximum of 1.5. Outside, the development may be less intense, from a 0.3 to 1.0 FAR. Outside the core, parking lots are allowed. Inside the core, the parking must be on site in a parking structure. Existing surface parking (not on Petitioner's land) may continue until redeveloped. There are additional restrictions on land use inside the core that are not imposed outside the core.

The creation of the intense urban core amounted to down zoning of the three vacant properties therein. This zoning action determined, in particular, how property proposed for development by OPUS Southwest Development Council could be used. This case is

factually similar to *Davis v. City of Albuquerque*, 98 N.M. 319, 648 P.2d 777 (1982), where the city down zoned eight blocks of a sector from R-3 to R-1, while only slightly down zoning the surrounding area. In *Davis*, the Court clarified that *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) pertains not only to piecemeal rezoning but to any unreasonable rezoning of only a small piece of land. Also, even when down zoning is done pursuant to a comprehensive plan, it must be based on mistake or change.

2. Said zoning action was a quasi-judicial act by the City Council, *Dugger v. City of Santa Fe*, 114 N.M. 47, 51, 834 P.2d 424, 428 (Ct. App. 1992), and, as such, is subject to whole record review by this Court, *West Old Town Neighborhood Ass'n v Albuquerque*, 122 N.M. 495, 498, 927 P.2d 529, 532 (Ct. App.), *cert. denied*, (1996):

> "Because the challenged zoning actions are quasi-judicial, the administrative standard of review would be the appropriate standard. [citation omitted] We apply a whole record standard of review to administrative decisions looking at all the evidence, favorable and unfavorable, bearing on a decision to determine if there is substantial evidence to support the result."

3. Pursuant to Resolution 270-1980, rezoning decisions must be based on an error in the existing zone map, on changed neighborhood or community conditions or on the premise that a different use category would be more advantageous to the community. *West Old Town*, at 500. Demonstration of one of these factors is especially important when it is the City that is initiating the change and the change, as it is here, is more restrictive.

> "If a zoning body is going to attempt to participate in the decision-making process as both petitioner and judge, the very least that can be expected is that it will play the game according to its own rules." *Miller* at 507.

4. The record is not supported by substantial evidence that the City Council met its burden of demonstrating that there was an error in the 1981 Uptown Sector Plan, that changes in the neighborhood or in community conditions justified this revision to the 1981 Uptown Sector Plan, or that the amendments were more advantageous to the community. The City made no findings and does not now take the position that there was an error in the original Uptown Sector Development Plan. The only condition cited by the City Council (R. 623, 903) was motor vehicle usage threatening air quality standards; and it is not explicitly stated as a changed condition. Assuming it is a changed condition, the Plan revisions have no appreciable impact on this condition, as noted above. Finally, there was no substantial evidence that the community would be advantaged by application of the most rigorous and burdensome requirements, which set the highly intense FAR, decimated allowable retail use and required structured parking for very few properties, while allowing much less restricted development outside of an urban core of Uptown.

5. By failing to give reasons for its changes to the 1981 Uptown Sector Plan, the City Council failed to comply with its own procedures and deprived Petitioner of procedural due process (notice and the opportunity to prepare an adequate defense). *Miller* at 506. *See also Muiler v. City of Albuquerque*, 92 N.M. 264, 587 P.2d 42 ((1978) which relied upon *City of Roswell v. New Mexico Water Qual. Con. Comm'n*,

84 N.M. 561, 505 P.2d 1237 (Ct. App. 1972) for the proposition that while *formal* findings are not required, the record must indicate the reasoning of the fact finder and the basis on which it adopted the action. [sic]

6. By hearing its own application for amendments to the Uptown Sector Plan without providing Petitioner with procedural safeguards, the City Council deprived Petitioner of its right to a meaningful and impartial decision-maker. *Miller* at 507. It is true that Petitioner (and Winrock and Coronado Centers, and the neighborhood associations, and the Uptown Association, and members of the public) had more opportunities to provide written material to various City staff and committees than is generally allowed in a quasi judicial proceeding, and more occasions when it was given the opportunity to address City staff and agencies orally (usually for three to ten minutes). Such opportunities are no substitute for a hearing before an impartial decision maker, however, which is what Petitioner was entitled to.

Petitioner should prepare a proposed order on this ruling, obtain opposing counsel's approval as to form and submit it to the Court at the status conference set for July 10, 1998, notice of which is send [sic] under separate cover.

/s/ SUSAN M. CONWAY
THE HONORABLE SUSAN M. CONWAY
DISTRICT JUDGE

APPENDIX F

THE SUPREME COURT OF THE
STATE OF NEW MEXICO

No. 31,725

ALBUQUERQUE COMMONS PARTNERSHIP,
Petitioner-Respondent and Cross-Petitioner,

v.

CITY COUNCIL OF THE CITY OF ALBUQUERQUE,
Respondent-Petitioner and Cross-Respondent.

June 22, 2009

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, response and conditional cross-petition for writ of certiorari the court have considered said pleadings, and being sufficiently advised, Chief Justice Edward L. Chávez, Justice Patricio M. Serna, Justice Petra Jimenez Maes, Justice Richard C. Bosson, and Justice Charles W. Daniels concurring;

NOW, THEREFORE, IT IS ORDERED that the petitions for writ of certiorari are denied in Court of Appeals number 24026/24027/24042/24425.

IT IS SO ORDERED.

WITNESS, The Hon. Edward L. Chávez, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 22nd day of June, 2009.

(SEAL) /s/ Madeline Garcia
Madeline Garcia, Chief Deputy Clerk